Supreme Court, U. S.
FILED
MAY 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Constitutional provisions and Rules	3
Raising the federal question	4
Statement of the case	4
The question is substantial	10
Conclusion	13
Appendix	1a

CITATIONS

Cases:

Bates v. Arizona State Bar, No. 76-136	10
Bigelow v. Virginia, 421 U.S. 809 (1975)	10
Hoffstetter v. Kronk, 20 Ohio St.2d 117	6 6
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	10
United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967)	10

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U. S. 748 (1976) 10, 11, 12

Rules:

Ohio Code of Professional Responsibility:

DR 2-103(A) 1, 3, 4, 5, 13

DR 2-104(A) 1, 3, 4, 5, 13

IN THE

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OCTOBER TERM, 1976

No.

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

On Appeal from the Supreme Court of Ohio

JURISDICTIONAL STATEMENT

Albert Ohralik, the appellant, appeals from the final judgment of the Supreme Court of Ohio, dated December 15, 1976, holding that DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility, as applied in this case, are not unconstitutional as being violative of appellant's right of free speech guaranteed by the First Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, which appears in the appendix hereto, p. 1a, *infra*, is reported at 48 Ohio St.2d 217 (1976).

The findings of fact and recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, dated May 18, 1976, are not reported. They are reprinted in the appendix hereto, p. 11a *infra*.

JURISDICTION

The judgment of the Supreme Court of Ohio, indefinitely suspending appellant from the practice of law in Ohio, was entered on December 15, 1976. See p. 5a, *infra*. A motion for rehearing was entertained and denied on February 24, 1977. See p. 7a, *infra*.

A supplementary notice of appeal to this Court was duly filed in the Supreme Court of Ohio on March 21, 1977. See p. 8a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility are violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to suspend a lawyer indefinitely from the practice of law for having orally solicited his legal services on two occasions, there

being no claim of misrepresentation, overreaching, fraud, or other activity impinging on any public interest or on any interest of the clients.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

DR 2-103(A), Ohio Code of Professional Responsibility:

A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR 2-104(A), Ohio Code of Professional Responsibility:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

• • • •

RAISING THE FEDERAL QUESTION

At the earliest stage of the disciplinary proceedings below the appellant raised the claim, in a motion to dismiss the complaint, that DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility were "unconstitutional for repugnancy to the free speech provisions of the First Amendment to the United States Constitution." Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline, p. 15a, *infra*. As the opinion of the Supreme Court of Ohio indicated (p. 3a, *infra*), the Board "found respondent's defense, that the solicitation of business by an attorney is protected by the First and Fourteenth Amendments to the United States Constitution, to be without merit and overruled respondent's motion to dismiss."

This First Amendment claim was reiterated by appellant before the Supreme Court of Ohio. There he renewed his motion to dismiss the proceedings "on the ground that DR 2-103(A) and DR 2-104(A) are unconstitutional for the reason that they deprive respondent of free speech as guaranteed by the United States and Ohio Constitutions." See opinion below, p. 4a, *infra*. The Ohio Supreme Court overruled the renewed motion to dismiss. *Ibid.* It thus considered and expressly rejected this federal constitutional claim.

STATEMENT OF THE CASE

The appellant, Albert Ohralik, was admitted to the practice of law in Ohio in 1948. At all material times, he resided in the township of Montville, Ohio, while maintaining his law office in Cleveland, Ohio.

In September of 1975, the appellee Ohio State Bar Association filed a complaint with the Board of Commissioners on Grievances and Discipline against the appellant. The complaint alleged that he was guilty of the following misconduct:

> On or about February 13, 1974, Respondent learned that Carol McClintock and Wanda Lou Holbert of Chardon, Ohio, had been injured in an automobile accident. He then contacted Albert and Helen McClintock, the parents of Carol McClintock. Upon being informed that Carol McClintock was in the hospital, Respondent went to see her and advised her as to her legal rights. She thereupon employed Respondent to represent her as to her claims arising out of the accident.
>
> On or about February 13, 1974, Respondent also went to the home of Wanda Lou Holbert and interviewed her regarding the accident. During such interview, Respondent advised Wanda Lou Holbert that she had a good claim for recovery for her injuries as a result of the accident and offered his services as an attorney to represent her. She thereupon employed Respondent.
>
> Relator says that Respondent has violated DR-2-103(A) and DR 2-104(A) of the Code of Professional Responsibility.

The relevant facts that led to this charge, while contested in various respects, may be fairly summarized as follows:

(1) For many years preceding the events of 1974, appellant had been a prominent, esteemed and newsworthy attorney in Montville township. In 1964, he had sought

to be a candidate for election as a state representative, and received the signatures of Arnold and Helen McClintock (among many others) on his nominating petition. Later, he was a publicized candidate for election as a precinct committeeman. He had also been conspicuous in the area as counsel for a former judge in his suit for recovery of his salary for his full elected term. See *Hoffstetter* v. *Kronk*, 20 Ohio St.2d 117.[1]

(2) Since 1968, appellant had maintained a mailbox in the Montville postoffice, which he often visited twice a day to pick up mail. On many occasions, perhaps 200 times a year, he had met some member of the McClintock family at the postoffice and exchanged pleasantries with them. He had thus come to know Carol McClintock as a friend. Wanda Lou Holbert also frequented the postoffice, but appellant knew her only by sight.

(3) On February 4 or 5, 1974, the postmaster's brother advised appellant that Carol McClintock had been badly injured in an auto accident "last Saturday" – which was February 2, 1974. Appellant expressed his regrets. But he did not seek to contact or to speak to any member of the McClintock family until February 13.

(4) On February 13, appellant met the postmaster's brother again and inquired as to Carol McClintock's condition. Since the said brother had heard no further word, appellant called the McClintock home and asked Carol's mother, Helen McClintock, about her well-being. Mrs. McClintock replied that Carol was in a hospital in Painesville, Ohio, and asked appellant "is one of you there an attorney?" Appellant told her that both he and his brother

[1] Appellant's opponent in that litigation was also the chairman of the county bar association's grievance committee that initiated the disciplinary proceeding against appellant.

were attorneys, but that that was not why he was phoning. Mrs. McClintock then asked appellant if he would stop by the house on the way to the hospital, where he intended to pay Carol a friendly visit.

(5) Upon visiting the McClintocks' house the morning of February 13, appellant was apprised by them of their fear that they might be sued by the parents of the other young woman (Wanda Lou Holbert) who had been riding with Carol McClintock as a guest at the time of the accident. They broached the subject of appellant representing Carol and pointed out that the hospital administrator had urged them to engage a certain law firm. Appellant allayed their fears by reference to the Ohio guest statute.

(6) Appellant immediately drove to the hospital to visit Carol, who was pinnioned and propped in bed. Entirely on her own initiative, she told appellant that on the day of the accident a hospital administrator had urged her to employe a certain law firm. Just as he was about to leave, Carol told him to tell her parents to call upon her that evening to discuss whether to hire appellant as attorney.

(7) Appellant then returned to the McClintocks' house once again. When he arrived, he found that Carol had already called her parents and asked them to tell appellant to go ahead in representing her. Appellant also examined the McClintocks' automobile liability policy and discussed the law applicable to passenger guests; he was also told the address of Wanda Lou Holbert so that he could discuss the details of the accident with her. All of this conversation with the McClintocks was tape recorded by appellant, and the tape was introduced at the disciplinary hearing. A written agreement with Carol was signed on February 15.

(8) Appellant thereupon drove to the home of Wanda Lou Holbert, who had just returned from a hospital confinement. He told Wanda that he had just been retained by Carol McClintock and wanted to get some of the details of the accident. Wanda replied that she could remember no details. Appellant then remarked that Wanda had a good claim too, and that he could handle it along with Carol's claim; he added that if she were to recover anything, he would ask for one-third of the recovery. Wanda replied "O.K." – which was the only agreement ever made with appellant. There never was a written agreement. All of this conversation with Wanda was tape recorded by appellant, and the tape was introduced at the disciplinary hearing.

(9) Wanda's mother attempted to repudiate the agreement the next morning. But it was not until March 14 that Wanda herself wrote a letter saying that appellant was no longer her lawyer. In the meantime, appellant had made certain demands on Wanda's behalf, but he never consummated any settlement for her.

(10) Appellant's relationships with Carol McClintock were harmonious, however, and he pursued her claims with vigor. The maximum recovery possible for her was $12,500.00 under the uninsured motorist coverage. And, indeed, by April 11, 1974, appellant had sent the insurance carrier a demand that Carol be paid $12,500.00.

(11) On April 12, 1974, without prior warning, appellant received a communication from Carol McClintock discharging him as her attorney and demanding that he submit the file to another attorney. Shortly thereafter, appellant received an acknowledgment from the insurance carrier that her claim was indeed worth $12,500.00 and that it would pay said amount upon execution of the

proper releases. When this information was conveyed to Carol, she refused to participate in the release of these moneys and asserted that appellant was entitled to no fee for his services. Her new counsel also stated that appellant's services were worthy of no compensation.

(12) Appellant's position as to Carol McClintock was that he had a valid written retainer agreement with her, which he was determined would be performed. Appellant sued Carol McClintock on her signed agreement for the value of services rendered, and ultimately accepted a settlement in the amount of $4,166.66. As to Wanda Lou Holbert, appellant testified that he would abandon his claim against her because of his belief that under the disciplinary rules an ethical question arises "if a contract has its origin in a controversy." See opinion below, p. 3a, *infra*.

Complaints were then made by both Carol McClintock and Wanda Lou Holbert, and these disciplinary proceedings followed. After considering the testimony and exhibits, the Board of Commissioners on Grievances and Discipline recommended that the appellant "be given a public reprimand." See p. 15a, *infra*. But the Supreme Court of Ohio, upon its review of the same record, ordered that appellant "be indefinitely suspended from the practice of law for these unethical violations of the Code of Professional Responsibility." See p. 4a, *infra*. The Supreme Court did not explain why appellant's conduct constituted violations; nor did it distinguish in any way the applicability of DR 2-103(A) and DR 2-104(A) to the facts of the case.

THE QUESTION IS SUBSTANTIAL

The question as to the First Amendment implications of the widespread practice of penalizing lawyers who speak out to recommend their own services is a novel and substantial one. It has never been treated before by this Court.

Lawyers, of course, are entitled to First Amendment protection as is any other citizen. One of the major issues now before this Court is the extent to which the First Amendment outlaws a total ban on written advertising by the attorney. *Bates* v. *Arizona State Bar*, No. 76-316. This case presents the oral side of that First Amendment coin. Does a lawyer have any constitutional right to proclaim his availability, or to recommend his own services, by word of mouth?

This Court has recognized that organizations have a First Amendment right to inform their members (orally or in writing) of their legal rights and to recommend and provide legal services. *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); *United Mine Workers* v. *Illinios State Bar Association*, 389 U.S. 217 (1967); and see *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). The reverse of that organizational problem is here present. Does the individual attorney have a right to advise others of their legal rights and to recommend his own legal service?

Moreover, the continued vitality of the traditional absolute ban – like Ohio's – on an individual attorney's solicitation of legal representation has recently been drawn into question by this Court. In *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976), the Court overturned, as violative of the First and Fourteenth Amendments, a Virginia law that barred advertisements by

Virginia pharmacists of the prices they charged for prescription drugs. In so holding, the Court noted (425 U.S. at 773) that a state may not

> ". . . completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients."

The Court recognized that a state has a strong interest in "maintaining a high degree of professionalism on the part of licensed pharmacists." 425 U.S. at 776. But it found that the interests of the pharmacists, consumers and society in the free flow of such commercial information outweighed the tired sibboleths of professionalism, teaching that any kind of competitive advertising is unethical.

At the same time, the Court recognized that certain forms of commercial speech regulations are "surely permissible" and strongly hinted that commercial speech may, consistent with the First Amendment, be subject to closer regulation than other varieties of speech. 425 U.S. at 770 and 771, n. 24.

The question, then, is whether the *Virginia Pharmacy* rationale should be extended to the regulation of another type of professionalism – *i.e.*, lawyers. Such an extension is by no means certain, for as the Court noted in its final footnote 25, 425 U.S. at 773,

> "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians

> and lawyers, for example, do not dispense standardized products; they render professional services of almost indefinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."

See also the concurring opinion of the Chief Justice, 425 U.S. at 774.

Despite such doubts, a substantial First Amendment question is raised on the record in this case. No interest of the state of Ohio was found to be at stake by the Supreme Court of Ohio, which merely brushed aside the First Amendment claim without comment. There was no finding that appellant's oral solicitation involved any degree of misrepresentation, overreaching or fraud. No finding was made that the appellant's legal services were excessively priced or reflected incompetence. No finding was made that appellant manufactured his clients' causes of action, or did anything that cast the legal profession in a bad light. All that appellant told his clients about the law and his services appears on this record to have been totally truthful. And they were clients whom he had previously known and seen in a small community. The clients were neither deceived nor confused.

Why, then, should appellant not be protected in his First Amendment right to speak freely, even in commercial terms? Why are not the consumers of legal services entitled to know the availability of competent lawyers like appellant? On any balancing of the state's interests with those of the appellant, how can Ohio's interest in blindly enforcing professional standards prevail?

Ohio has imposed its DR 2-103(A) and DR 2-104(A) in such a way as to subject appellant to the supreme penalty of the legal profession – indefinite suspension or disbarment. The absence of any discernible interest in so doing only adds substantially to the First Amendment claim.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

Statement of the Case.

OHIO STATE BAR ASSOCIATION *v.* OHRALIK.

[Cite as Ohio State Bar Assn. v. Ohralik (1976), 48 Ohio St. 2d 217.]

Attorneys at law—Misconduct—Indefinite suspension—Acts warranting.

(D. D. No. 76-8—Decided December 15, 1976.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

Albert Ohralik, respondent, was admitted to the practice of law in Ohio in March 1948. He is 55 years old and resides in Montville, Ohio. His law office is in Cleveland.

Relator, Ohio State Bar Association, filed a complaint with the Board of Commissioners on Grievances and Discipline against Albert Ohralik, alleging that he solicited the personal injury cases of Carol McClintock and Wanda Lou Holbert in violation of DR 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility.

Most of the material events involved in this complaint occurred on or about February 13, 1974. In the early morning of that day, while at the Montville, Ohio, Post Office, respondent learned from the postmaster's brother that Carol McClintock, of Montville, and Wanda Lou Holbert, of Chardon, had been involved in a serious automobile accident. Neither Carol McClintock nor Wanda Lou Holbert were relatives or former clients of respondent. Both were, if anything, casual acquaintances. Upon learning of the accident, which had occurred on February 2, 1974, respondent telephoned Carol's mother, obtained her consent to visit Carol at the hospital, and, later that day, proceeded to the hospital where Carol was undergoing treatment for the injuries sustained in the accident.

Carol McClintock testified that, until respondent visited her in the hospital on February 13th, she did not know that he was a lawyer. She admitted to a casual acquaintanceship with him, which began with her visits to the

Statement of the Case.

Montville Post Office to pick up the family mail, and which was limited to a customary exchange of greetings on such occasions. She also knew that her father had purchased an automobile from respondent a number of years ago. Disputing this testimony, respondent insisted that Carol must have been aware that he was a practicing lawyer because, among other things, he had been a candidate for a political office and the fact was evident from his campaign literature.

After reviewing with Carol the legal merits of her cause and the need for proper representation, respondent obtained Carol's consent to handle the claim. Leaving the hospital, respondent drove to the home of Carol's parents, where he examined their automobile liability policy, discussed the law applicable to passenger guests, and obtained the address and directions to the home of Wanda Lou Holbert, a passenger in the automobile driven by Carol McClintock.

Wanda Lou was then 18 years of age. Respondent, upon being admitted to her home, advised Wanda that he represented Carol McClintock, and that he had a "tip" for her, namely: that she had a substantial legal claim for the injuries she had suffered while riding as a passenger in the automobile driven by her neighborhood friend, Carol. He further informed her he was prepared to supply her with the legal services necessary to capitalize on her claim. Respondent's representations induced Wanda to orally agree to employ her attorney in the matter.

The following February 14, 1974, respondent telephoned Wanda Lou for purposes of firming the client-attorney relationship begun the preceding day. The phone was answered by Wanda Lou's mother, who unceremoniously advised him that his services were not desired. Respondent retorted by pointing out that it was not she but Wanda Lou, a competent consenting adult, who was his client.

Respondent, in support of his claim that a binding agreement to engage his services had been made with

Statement of the Case.

Wanda Lou, introduced in evidence a tape recording of the February 13, 1974, conversation with Wanda Lou. The recording was made on respondent's recorder, hidden at the time of recording under respondent's coat, and made without the knowledge of Wanda Lou. Some of the recorded conversation indicates a consent by Wanda Lou to the utilization of respondent's professional services, but the conversation also demonstrates that this consent was induced and solicited by respondent.

Thereafter, both Carol and Wanda attempted to disengage respondent's services. Wanda's attempt began immediately, and Carol's some time after February 1974. Respondent insisted he had a valid binding agreement with both, which he was determined would be performed. Respondent sued Carol McClintock on her signed agreement for the value of services rendered, and ultimately accepted a settlement in the amount of $4,166.66. He testified that, as to Wanda Lou Holbert, he will abandon his claim against her because of his belief that under the disciplinary rules an ethical question arises "if a contract has its origin in a controversy."

Respondent's answer to the complaint denied violation of the above disciplinary rules and moved to dismiss the complaint, contending that the above provisions of the Code of Professional Responsibility are unconstitutional for repugnancy to the free-speech provision of the First Amendment to the United States Constitution.

After hearings on November 24, 1975, and January 29, 1976, the board found that the respondent did, in fact, solicit the personal injury cases of Carol McClintock, and Wanda Lou Holbert, in violation of DR 2-103(A) and DR 2-104(A), Code of Professional Responsibility.

The board found respondent's defense, that the solicitation of business by an attorney is protected by the First and Fourteenth Amendments to the United States Constitution, to be without merit and overruled respondent's motion to dismiss.

Although not objecting to the findings of fact of the

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Opinion *Per Curiam*.

board, respondent renewed his motion to dismiss these proceedings on the ground that DR 2-103(A) and DR2-104 (A) are unconstitutional for the reason that they deprive respondent of free speech as guaranteed by the United States and Ohio Constitutions.

This court overruled respondent's renewed motion to dismiss.

Mr. John R. Welch, Mr. Albert L. Bell, Mr. Edward N. Heiser and *Mr. James S. Patrick*, for relator.

Mr. Walter S. Haffner, for respondent.

Per Curiam. DR 2-103(A) of the Code of Professional Responsibility provides:

"A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."

DR 2-104(A) reads:

"A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: • • • [exceptions not applicable here]."

A review of the record before us reflects ample, uncontroverted evidence supportive of the finding of the Board of Commissioners on Grievances and Discipline that respondent, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A), set forth above, in soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them in their respective claims for damages arising out of the accident of February 2, 1974.

It is the considered judgment of this court that respondent be indefinitely suspended from the practice of law for these unethical violations of the Code of Professional Responsibility.

Judgment accordingly.

O'Neill, C. J., Herbert, Corrigan, Stern, Celebrezze, W. Brown and P. Brown, JJ., concur.

THE SUPREME COURT OF
THE STATE OF OHIO
Of the Term of January, 1976.
To-wit: December 15, 1976.

Ohio State Bar Association, *Relator,*	ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE
v.	
Albert Ohralik, *Respondent.*	*DD No. 76-8*

It appearing to the Court that the Board of Commissioners on Grievances and Discipline filed its Final Report in this Cout on May 19, 1976, recommending that the respondent, Albert Ohralik, be given a public reprimand pursuant to Section 6(c) of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio, and it further appearing that Respondent filed objection to the Final Report of the Board of Commissioners on Grievances and Discipline, this cause was submitted to the Court. On consideration thereof, it is ordered and adjudged by this court that the respondent, Albert Ohralik, be indefinitely suspended from the practice of law, pursuant to Section 6(b) of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

The respondent, Albert Ohralik, is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any

kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to a member in in good standing of the legal profession of Ohio.

It is further ordered that the respondent, Albert Ohralik, surrender his certificate of admission to practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, Albert Ohralik, pay the costs of these proceedings taxed in the amount of One Thousand Seven Hundred Ninety Seven Dollars and twenty-eight cents ($1,797.28).

It is further ordered that the Clerk of this Court issue certified of this entry as provided for in Section 20 of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

APPROVED: CHIEF JUSTICE
(C. WILLIAM O'NEILL)

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, *1977 TERM*
City of Columbus. *to wit:* February 24, 1977

Ohio State Bar Association,
Relator, *No.* DD 76-8

v.

Albert Ohralik,
Respondent. REHEARING

It is ordered by the court that rehearing in this case is denied.

THE SUPREME COURT OF OHIO

OHIO STATE BAR ASSOCIATION *Relator,*	CASE NO. DD 76-8
v.	ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS
ALBERT OHRALIK *Respondent.*	ON GRIEVANCES AND DISCIPLINE

[Filed: March 21, 1977]

SUPPLEMENTARY NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Respondent ALBERT OHRALIK hereby appeals to the Supreme Court of the United States from the final judgment affirming the Final Report of the Board of Commissioners on Grievance and Discipline entered in this action on December 15, 1976, and from the denial of respondent's Motion for Rehearing entered in this action on February 24, 1977. This appeal is taken pursuant to 28 U.S.C. §1257(2).

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. all docket and journal entries.
2. all brief, pleadings and original papers.
3. all reports and judgment entries on said reports.
4. all motions filed herein and the rulings on said motions.

The following questions are presented by this appeal:

I. DR 2-103 (A) and DR 2-104(A) of the Code of Professional Responsibility of the State of Ohio are unconstitutional since they deprive respondent of the rights of free speech as guaranteed to respondent by the First Amendment of the Constitution of the United States and made applicable to the states by the Fourteenth Amendment of the federal constitution.

II. The failure of the Ohio Supreme Court to afford respondent a hearing upon his objections to the Report of the Board of Commissioners on Grievance and Discipline, in contravention of Rule V(20) of the Supreme Court Rules for the Governance of the Bar of Ohio, violates the Fourteenth Amendment Due Process clause.

III. The charges brought against respondent before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio were so vague as to fail to put respondent on notice of the allegation against him, in contravention of the Fourteenth Amendment Due Process clause.

IV. The Supreme Court of Ohio considered matters relating to respondent's conduct contained in the Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, which matters were not charged in

the Complaint and Certificate brought by the Ohio State Bar Association before the Board of Commissioners, in deciding to impose a greater penalty than that recommended by the Board of Commissioners, in contravention of the Fourteenth Amendment Due Process clause.

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APPENDIX B

FILED
MAY 18, 1976
BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
WILLIAM D. RADCLIFF, Sec'y.

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	:	CASE NO. 229
Complaint against:	:	
Albert Ohralik,	:	
Respondent,	:	**Findings of Fact and Recommendation**
Ohio State Bar Association,	:	**of the Board of Commissioners on**
Relator.		**Grievances and Discipline of** **The Supreme Court of Ohio**

This matter was heard by the Hearing Panel on November 24, 1975 and January 29, 1976.

The Complaint against Respondent alleged that the Respondent, Albert Ohralik, in violation of Disciplinary Rule 2-103A and Disciplinary Rule 2-104A of the Code of Professional Responsibility, solicited the Personal Injury cases of Carol McClintock and Wanda Lou Holbert. Respondent's Answer to the Complaint denied a violation of DR 2-103A and DR2-104A and, coupled with a motion to dismiss, contended that these provisions of the Code of Professional Responsibility are unconstitutional for repugnancy to the free speech provisions of the First Amendment to the United States Constitution.

DISCUSSION

Respondent, age 54, was admitted to the practice of law in the State of Ohio in March of 1948. At all times material to the Complaint, Respondent resided in the township of Montville, Ohio, Geauga County, and maintained an office in Cleveland, Ohio.

Most of the material events involved in this case occurred on or about February 13, 1974. In the early morning of that day, while at the Montville, Ohio postoffice, Respondent learned from the Postmaster's brother that Carol McClintock and Wanda Lou Holbert, of Chardon, Ohio, had been involved in a serious automobile accident. Neither Carol McClintock nor Wanda Lou Holbert were relatives or former clients of Respondent. Both were, if anything, casual acquaintances. Upon learning of the accident, which had occurred on February 2, 1974, Respondent concluded it would be a good thing to contact Carol. He thereupon telephoned her parents, obtained their consent to visit Carol at the hospital, and then proceeded to the hospital where Carol was undergoing treatment of the injuries sustained in the accident.

Carol McClintock testified that until Respondent visited her in the hospital on February 13th, she did not know that he was a lawyer. She admitted to a casual acquaintanceship with him, which began with her visits to the Montville postoffice to pick up the family mail, and which was limited to a customary exchange of greetings on such occasions. She also knew that her father had purchased an automobile from Respondent a number of years ago. Disputing this testimony, Respondent insisted that Carol must have been aware that he was a practicing lawyer because, among other things, he had been a candidate for a political office, and had displayed political campaign posters in his yard situated a mere mile from Carol's home.

After reviewing with Carol the legal merits of her cause and the need for proper representation, Respondent obtained Carol's consent to handle her claim. Leaving the hospital, Respondent drove to the home of Carol's parents where he examined their automobile liability policy, discussed the law applicable to passenger guests and obtained the address and directions to the home of Wanda Lou Holbert, a friend and passenger in the automobile driven by Carol McClintock.

Wanda Lou was 18 years of age. Respondent, upon being admitted to her home, advised Wanda that he represented Carol McClintock, and that he had a "tip" for her. Namely, that she had a substantial legal claim for the injuries she had suffered while riding as a passenger in the automobile driven by her neighborhood friend Carol. He further informed her he was prepared to supply her with the legal services necessary to capitalize on her claim. Respondent's representations induced Wanda to orally agree to engage him as her attorney in the matter.

The following day, February 14, 1974, Respondent telephoned Wanda Lou for purposes of firming the client-attorney relationship begun the preceding day. The phone was answered by Wanda Lou's mother, who unceremoniously advised him that his services were not desired. Respondent retorted by pointing out that it was not she but Wanda Lou, a competent consenting adult, who was his client. He, therefore, would disregard the comments and views expressed by her andwould not tolerate her interference with the professional relationship he had established with her daughter.

Respondent, in support of his claim that a binding agreement to engage his services had been made with Wanda Lou, introduced into evidence a taped recording of the February 13, 1975 conversation with Wanda Lou. The recording was

made on Respondent's recorder, hidden at the time of recording under Respondent's coat, and made without the knowledge of Wanda Lou. Some of the recorded conversation indicates a consent by Wanda Lou to the utilization of Respondent's professional services, but the conversation also demonstrates that this consent was induced and solicited by Respondent.

Thereafter, both Carol and Wanda attempted to disengage Respondent's services. Wanda's attempt began immediately, and Carol's in April, 1974. Respondent insisted he had a valid binding agreement with both, which he was determined would be performed. Respondent sued Carol McClintock on her signed agreement for the value of services rendered, and ultimately accepted a settlement in the amount of $4,100.00 to dispose of his claim. He testified that, as to Wanda Lou Holbert, he will abandon his claim against her because of his belief that under the Disciplinary Rules an ethical question arises "when a contract has its origin in a controversy." (Tr. 256)

It may be noted that no accusations or charges were leveled against Respondent by Relator for his conduct in clinging to the contracts of employment obtained in the manner found above. In some respects, Respondent's refusal to accommodate the desires and instruction of his solicited clients may be as reprehensible as the conduct condemned by Relator. However, there is insufficient evidence on which to base a finding that these activities, too, were violative of the Respondent's professional responsibilities.

Nor is there any evidence showing that Respondent's solicitation of Carol and Wanda Lou is part of an established or habitual course of conduct. Indeed, the only evidence of soliciting in the record is the pursuit of Wanda and Carol's causes.

FINDING OF FACT

The evidence fully demonstrates that Respondent in seeking and obtaining agreements from Wanda Lou Holbert and Carol McClintock to represent them in their respective claims for damages arising from the accident of February 2, 1974, violated Disciplinary Rule 2-103A and 2-104A of the Code of Professional Responsibility. Respondent's defense that the solicitation of business by an attorney is protected by the First Amendment to the Federal Constitution is without merit. His Motion to Dismiss predicated on this ground was overruled.

RECOMMENDATION

The Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio recommends that, pursuant to Section 15 Rule V of the Supreme Court Rules For The Government Of The Bar Of Ohio, Respondent, Albert Ohralik, be given a public reprimand.

/s/Robert L. Moulton
Chairman, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

/s/William D. Radcliff
Secretary, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

MOTION FILED
AUG 24 1977

Supreme Court, U. S.
FILED
AUG 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

No. 77-56

IN THE MATTER OF EDNA SMITH,

Appellant.

BRIEF OF AMICI CURIAE PUBLIC CITIZEN AND THE NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES URGING THE COURT TO GIVE PLENARY CONSIDERATION TO THE PRESENT APPEALS

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August 24, 1977

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*	i
INTERESTS OF *AMICI*	ii
BRIEF OF *AMICI CURIAE*	1
STATEMENT OF THE CASES	2
ARGUMENT	5
I. PLENARY REVIEW OF THE PRESENT APPEALS IS WARRANTED	5
II. AT THE VERY LEAST, THE JUDGMENTS BELOW SHOULD BE SUMMARILY VACATED	8
CONCLUSION	10

IN THE

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Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

No. 77-56

IN THE MATTER OF EDNA SMITH,

Appellant.

MOTION OF PUBLIC CITIZEN AND THE NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES FOR LEAVE TO FILE A BRIEF AMICI CURIAE URGING THE COURT TO GIVE PLENARY CONSIDERATION TO THE PRESENT APPEALS

Public Citizen and the National Resource Center for Consumers of Legal Services hereby move the Court for leave to file the accompanying brief *amici curiae* urging the Court to grant plenary review in the above-entitled actions and to give adequate consideration to the consumer interests involved in those actions.

INTERESTS OF *AMICI*

Amici are two broad based consumer-oriented organizations whose interests will be directly affected by the disposition of the present proceedings. Each *amicus* has a significant organizational interest in improving the quality, availability and delivery of legal services, and each represents the interests that its individual members and supporters have in obtaining important information about the lawyers who are available to represent them.

Public Citizen is a non-profit organization supported by contributions from approximately 65,000 individuals annually. It engages in a wide variety of activities on behalf of consumers and is particularly concerned about laws and ethical restrictions that govern the price and quality of professional services as well as the dissemination of information about those services, especially as they relate to lawyers. Attorneys for Public Citizen represented the consumer plaintiffs in successful suits challenging the validity of lawyers' minimum fee schedules[1] and challenging the constitutionality of statutory prohibitions on drug price advertising.[2] In addition, Public Citizen has attempted to publish its own consumers' directory of physicians but has been forced by low physician participation to commece litigation challenging on First Amendment grounds the constitutionality of an advertising restriction that prohibits doctors from being listed in such directories.[3] Public Citizen has also submitted *amicus* briefs in the cases of *Jacoby*

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[1] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[2] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

[3] *Public Citizen v. Commission on Medical Discipline of Maryland*, No. 76-1944 (4th Cir., appeal pending).

v. State Bar of California, No. LA 30601 (Cal. Sup. Ct., May 3, 1977), and *Bates v. State Bar of Arizona*, ___ U.S. ___, No. 76-316 (June 27, 1977), both of which held that consumers have a right of access, protected by the First Amendment, to certain information about attorneys and their practices.

The National Resource Center for Consumers of Legal Services (the "Resource Center") is a non-profit organization funded by foundations and by its members, which include labor unions, cooperatives, credit unions, and other consumer groups. The Resource Center represents more than 27,000,000 individual consumers of legal services throughout the United States. A principal purpose of the Resource Center is to foster the growth and development of legal service delivery plans for low and middle income persons and to provide assistance to individuals and organizations that wish to establish such plans. Because the successful establishment and operation of these plans depends upon the ability of attorneys to disseminate information about their practices to consumers, the Resource Center is committed to improving the flow of such information. The Resource Center also participated *amicus curiae* in the *Jacoby* and *Bates* cases.

The interests presented by *amici* in this case are the interests of consumers in having meaningful access to information enabling them to determine when legal services may be useful, and allowing them to make informed choices among available lawyers and delivery systems. The informational interests of consumers are not identical to the interests of attorneys in disseminating information about their practices, but both interests are similar; consumers cannot secure meaningful access to information about attorneys if the attorneys are prevented from effectively disseminating that information. In fact, Last Term in *Bates*,

the majority opinion "deem[ed] it significant" that consumer organizations supported the elimination of the advertising ban struck down in that case. Slip Op. at 26 n.35. Consequently, presentation of the consumer interests will assist the Court in making an informed decision concerning the proper disposition of the present appeals.[4]

Respectfully submitted,

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August 24, 1977

[4] Although *amici* sought the consent of the parties to the filing of this brief, they were unable to obtain consents from all of the parties involved. Consequently, *amici* have made the present motion.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

No. 77-56

IN THE MATTER OF EDNA SMITH,

Appellant.

BRIEF OF AMICI CURIAE PUBLIC CITIZEN AND THE NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES URGING THE COURT TO GIVE PLENARY CONSIDERATION TO THE PRESENT APPEALS

INTERESTS OF *AMICI CURIAE*

The interests of *amici* are set out in the accompanying motion for leave to file a brief *amici curiae*.

STATEMENT OF THE CASES

Appellants in the two above-entitled actions are attorneys who have been disciplined for violating state prohibitions on solicitation which mirror the prohibitions contained in the American Bar Association's Code of Professional Responsibility. Both appellants were found to have violated DR2-104(A), which prohibits an attorney from accepting employment resulting from unsolicited advice given to laypersons concerning their legal rights. In addition, appellant Ohralik was found to have violated DR 2-103(A), which prohibits attorneys from recommending the employment of themselves or their partners or associates to non-lawyers, and appellant Smith was found to have violated DR 2-103(D), which prohibits attorneys from assisting organizations that promote or pay for their legal services. All three provisions restrict the flow of information from lawyers to consumers but consumer interests were not considered by either State Supreme Court below.

In No. 76-1650, appellant Ohralik was found to have violated the solicitation prohibitions by accepting employment from two women in a personal injury case under circumstances suggesting that he would not have been retained as their counsel if he had not taken certain actions to promote his own services. Both women ultimately became dissatisfied and discharged appellant Ohralik, but he had already asserted damage claims on their behalf and subsequently obtained the maximum statutory recovery for one of the women. Although appellant Ohralik initially claimed attorneys fees from both women, he persisted only in his claim against the woman for whom a recovery had been obtained. This claim was finally settled by payment of a fee equal to one-third of the total recovery.

For reasons that do not appear in the opinion below, both women filed grievance complaints against appellant Ohralik. The Ohio Board of Commissioners on Grievances and Discipline found that violations had occurred and recommended a public reprimand. The Supreme Court of Ohio sustained this finding but increased the punishment to indefinite suspension from practice. Neither the Board of Commissioners, nor the Ohio Supreme Court made detailed findings of fact. The record does not indicate whether the women were misled or deceived in any way. It does not show whether appellant Ohralik provided any valuable legal service to either woman, or whether he merely pressed an insurance claim that they could have successfully asserted themselves without a lawyer. The record also fails to show whether the women knew about their legal rights or were made aware of them only as a result of appellant Ohralik's actions. Moreover, the record does not show which specific actions the Supreme Court of Ohio found to violate the solicitation rules, nor does it show what abuses the Ohio Court believed that it was guarding against in ordering the imposition of sanctions. The record does not even indicate why the Supreme Court of Ohio found it necessary to significantly increase appellant Ohralik's punishment beyond that recommended at the administrative level.

In No. 77-56, appellant Smith, a black female attorney, was found to have engaged in improper solicitation by offering the services of the American Civil Liberties Union free of charge to an indigent woman who desired to sue her physician after he forced her to undergo a sterilization operation in order to continue receiving Medicaid benefits. Appellant Smith was requested by a non-lawyer representative of a local community organization to meet with several sterilized women to inform them of their legal

rights. It is not clear who initially desired this meeting, but after the meeting the organization's representative informed appellant Smith that one of the sterilized women wished to file suit against her doctor. Appellant Smith then wrote to the women offering the legal services of the ACLU at no cost. Shortly thereafter, however, at the instruction of the doctor's attorney, the woman telephoned appellant Smith from the doctor's office, to inform her that she did not wish to file suit after all. Appellant Smith did not communicate with the woman any further. Nevertheless, the physician's attorney related these events to the South Carolina Attorney General and to the Board of Commissioners on Grievances and Discipline, and disciplinary proceedings were initiated against appellant Smith for solicitation. The Board found that appellant Smith had unethically solicited a client on behalf of the ACLU and recommended a private reprimand. The South Carolina Supreme Court sustained the finding of improper solicitation, but *sua sponte* increased her punishment to a public reprimand.

Again, the record is barren of any evidence of injury to any person resulting from appellant Smith's actions, and the South Carolina Supreme Court never gave any indication whatsoever of the danger that it was guarding against by disciplining appellant Smith. In addition, the legal analysis contained in the Board's Panel Report, which was simply adopted in full by the South Carolina Supreme Court, is grossly inadequate. Difficult legal points were either glossed over completely or dealt with in conclusory terms, and the substantial constitutional problems raised by appellant Smith were treated as trivial. Moreover, appellant Smith's actions do not even seem to fall within scope of the prohibitions that she was found to have violated. Finally, as in *Ohralik*, the South Carolina Supreme

Court gave no indication of why it believed that increased punishment was warranted.

ARGUMENT

This Court should accord plenary review to the present appeals and should consider them together. Taken together the two appeals present a broader range of consumer concerns than is likely to be presented by any single case, thereby providing the Court with an opportunity to address the constitutional issues raised by soliciation prohibitions in a context that will allow a better resolution of those issues. If the Court does not grant plenary review, however, it should nonetheless vacate the two judgments below because appellees have not made the factual findings necessary to withstand First Amendment scrutiny set forth in this Court's decision in *Bates v. Arizona State Bar*, No. 76-316 (June 27, 1977), and have not found that discipline would best serve the consumer interests involved.

I. PLENARY REVIEW OF THE PRESENT APPEALS IS WARRANTED

In a long line of cases culminating in *Bates v. Arizona State Bar, supra*, this Court has repeatedly held that when states regulate activities in an area protected by the First Amendment, the regulations must be narrowly drafted to eliminate a specified evil and must not unnecessarily intrude upon protected speech. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 769-70 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 827-29 (1975). The Court's decision *Bates* also established that First Amendment protections apply to certain information communicated by lawyers to consumers. However, the solicitation prohibitions drafted by

the American Bar Association and adopted by nearly every state, seem to completely ignore the First Amendment. They use an axe where this Court has required the use of a scalpel, and as the present appeals indicate, they are capable of producing the same results in vastly differing fact situations. Moreover, although solicitation rules are purportedly designed to protect consumers, neither of the cases presently before the Court even paid lip service to the many consumer interests that are affected. As currently drafted, solicitation rules appear to be little more than potent weapons that state bars can use to discipline lawyers on an arbitrary basis regardless of the effect on consumer interests. As such, those rules can potentially be used to take back many of the benefits that this Court granted in *Bates*. This danger is heightened by the fact that, although the American Bar Association recently modified its advertising rules in light of the *Bates* decision, it refused to alter its solicitation rules, even though urged to do so by several consumer organizations, including *amici*.

The conclusion that the present solicitation rules must be re-examined is inescapable, and *amici* believe that the present appeals provide a uniquely appropriate context for this Court to undertake the necessary re-examination. When taken together, the present appeals raise many of the consumer interests that are related to the issue of solicitation. If attorneys fail to advise consumers about legal remedies available to them for fear of soliciting by subsequently accepting employment, the interest of consumers in having easy access to information is adversely affected. If attorneys who are particularly well suited to handle a particular case, or who might provide low cost legal services, refuse to do so for fear of soliciting, the interest of consumers in healthy competition and easy access to available attorneys is adversely affected. *Cf. United States v. National Society of Professional Engineers*, 555 F.2d 978, 984 (D.C. Cir. 1977). Moreover, if consumer-oriented organizations are severely limited in their activities by solicitation rules, consumers are deprived of one of their most effective sources of information and legal representation. On the other hand, if consumers are deceived or misled by over-zealous attorneys seeking new business, or are taken advantage of by attorneys who approach them when they are particularly susceptible to duress or coercion, the interest of consumers in making reasoned and informed decisions is adversely affected. All of these interests are arguably involved in the present appeals, and by considering them together, the Court will have before it a broader range of consumer interests than is ever likely to be presented in a single case.

The *Smith* case presents a situation in which solicitation prohibitions have apparently been used solely to prevent a victimized welfare mother from learning about and pursuing her legal remedies through an available attorney. Although solicitation rules are designed to protect the consumer, it can hardly be in the consumers' best interest to deprive them of the right to be told that they have a legal claim *and* that an attorney will represent them in advancing it without charge. The *Ohralik* case raises the specters of duress and ambulance chasing that are typically cited to justify solicitation rules, but that case suggests that the present rules may be overly strict since consumers appear to be better able to protect themselves than paternalistic bar associations would have us believe. Both cases expose the tremendous amount of discretion that the imprecise solicitation rules vest in state disciplinary bodies and demonstrate that those bodies are not above the questionable exercise of their powers; one cannot read the opinions below without concluding that both attorneys were in fact

being disciplined for reasons that do not appear in the record. The chilling effect that the threat of such disciplinary actions can have on the willingness of attorneys to speak freely with consumers may well be substantial. With both cases before the Court at the same time, it is less likely that any particular feature or type of solicitation will be overemphasized or that the Court will overlook the impact that a decision rendered in one context will have in another context.

The organized bar's current condemnation of virtually all solicitation is as untenable as its earlier condemnation of virtually all advertising. The constitutional and policy issues surrounding solicitation are important ones, and both consumers and the legal profession will benefit from this Court's guidance at the present time. Consequently, the Court should address those issues by granting plenary consideration of the present appeals.

II. AT THE VERY LEAST, THE JUDGMENTS BELOW SHOULD BE SUMMARILY VACATED

If the Court does not grant plenary review of the present appeals, it should, at the very least, vacate the judgments below. In both cases, the administrative and judicial opinions totally failed to consider any of the truly relevant factors. In neither case did the Court attempt to relate the actions under review to any substantive evil that was likely to occur, and in neither case were factual findings made to show what effect the Court's actions would have on the interests of consumers. In *Smith*, the challenged actions do not even appear to violate the language of the South Carolina disciplinary rules, let alone pose any danger that those rules were designed to prevent. In *Ohralik*, the record simply does not contain the findings necessary to determine whether, on balance, the appellant's two clients were ultimately helped or harmed by his actions, or whether they were able to adequately protect themselves from those actions without resort to the anti-solicitation rules. Aside from whatever injustice was done to the attorneys by these sketchy and conclusory proceedings, the injustice to consumers alone requires vacation of the judgments below. If lawyers can look forward to no more than the minimal substantive and procedural safeguards present in these cases, they will certainly be deterred from freely communicating with consumers.

It might be argued that a remand for further proceedings would be appropriate since the State Supreme Courts in both cases rendered their decisions prior to this Court's decision in *Bates*. However, *amici* believe that further proceedings would needlessly perpetuate uncertainty concerning the constitutionality of solicitation prohibitions. Even though there are large gaps in the records of both cases, the facts and legal analysis which do appear are sufficient to show that the broad solicitation rules currently in force pose serious First Amendment problems. Moreover, further proceedings would be especially inequitable with respect to appellant Smith since the South Carolina proceedings conducted to date have amounted to little more than harassment, and since the appellant has already once been denied federal court protection from the ordeal of those proceedings. *See American Civil Liberties Union v. Bozardt*, 539 F.2d 340 (4th Cir.), *cert. denied*, 429 U.S. 1922 (1976). However, if the Court should decide to remand for further proceedings, it should direct the State Supreme Courts to give primary consideration to the consumer interests involved, since those interests are what provide the basis for solicitation rules.

CONCLUSION

The interests of consumers and the legal profession will be best served if this Court addresses the constitutional issues related to solicitation rules in the context of the present appeals. The Court should, therefore, grant plenary review and consider both cases together. If the Court does not grant plenary review, however, it should at the very least vacate the judgments below.

Respectfully submitted,

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August 24, 1977

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the

Supreme Court of the United States

October Term, 1977

No. 76-1650

ALBERT OHRALIK,
Appellant,

v.

OHIO STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

DOCKETED MAY 24, 1977
PROBABLE JURISDICTION NOTED
OCTOBER 3, 1977

In the

Supreme Court of the United States

October Term, 1977

No. 76-1650

ALBERT OHRALIK,
Appellant,

v.

OHIO STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

INDEX

	Page
Relevant docket entries	1a
Complaint of Ohio State Bar Association	3a
Answer of respondent Ohralik	5a
Respondent Ohralik's motion to dismiss	6a
Excerpt from brief in support of motion to dismiss . . .	7a

	Page
Excerpts of testimony from transcript of proceedings before Board of Commissioners	8a
Wanda Lou Holbert	8a
Marie Holbert	23a
Gene Henry	24a
Carol McClintock	29a
Helen McClintock	43a
Albert Ohralik	49a
Transcript of taped conversation of Arnold McClintock, Helen McClintock and Albert Ohralik, Feb. 13, 1974	92a
Transcript of taped conversation of Albert Ohralik and Wanda Lou Holbert, Feb. 13, 1974	118a

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Items in appendix to jurisdictional statement:

Opinion of Supreme Court of Ohio	1a
Order of Supreme Court indefinitely suspending Ohralik from the practice of law in Ohio	5a
Order of Supreme Court denying rehearing	7a
Supplementary notice of appeal	8a
Findings of fact and recommendation of Board of Commissioners on Grievances and Discipline	11a

THE SUPREME COURT OF OHIO
January Term, 1977

Case No. DD76 [illegible]

Ohio State Bar Association,
Relator,

v.

Albert Ohralik,
Respondent.

Certified by the Board of Commissioners on Grievances and Discipline

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RELEVANT DOCKET ENTRIES

May 19, 1976	Transcript of Proceedings before Board of Commrs. together with exhibits filed.
May 19, 1976	Findings of Fact and Recommendation of the Board of Commrs. filed. [*Note:* These findings and recommendation are reproduced in the appendix to the jurisdictional statement herein, pp. 11a-15a].
May 19, 1976	Show cause order issued as required by Rule XVIII.
May 19, 1976	Order to Show Cause.
May 26, 1976	Motion to dismiss and Certificate of Service filed.

Sept. 17, 1976	Motion to dismiss overruled.
Oct. 7, 1976	Motion to delay ruling and Certificate of Service filed.
Dec. 15, 1976	Indefinite Suspension, J. 54-328 [*Note:* This order of indefinite suspension is reproduced in the appendix to the jurisdictional statement herein, pp. 5a-6a].
Dec. 15, 1976	Certified copy of opinion issued. [*Note:* A copy of the opinion of the Supreme Court of Ohio is reproduced in the appendix to the jurisdictional statement herein, pp. 1a-4a].
Dec. 23, 1976	Motion for stay of execution and Certificate of Service filed.
Jan. 3, 1977	1 Motion for rehearing and Certificate of Service filed.
Jan. 3, 1977	1 Motion for rehearing and Certificate of Service filed.
Jan. 4, 1977	Notice of Appeal to United States Supreme Court filed.
Feb. 7, 1977	Additional copies of Motion for leave to file and Motion for rehearing and Certificate of Service filed.
Feb. 24, 1977	Rehearing denied. J. 54-426 [*Note:* This order denying rehearing is reproduced in the appendix to the jurisdictional statement herein, p. 7a].
March 21, 1977	Supplemental Notice of Appeal to United States Supreme Court filed. [*Note:* This notice of appeal is reproduced in the appendix to the jurisdictional statement herein, pp. 8a-10a].
Oct. 11, 1977	Letter from United States Supreme Court requesting transcript.
Oct. 12, 1977	Certified copy of order from United States Supreme Court filed –probable jurisdiction.

BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE OF
THE SUPREME COURT OF OHIO

In re: Complaint against Albert Ohralik Respondent	No. 229 COMPLAINT AND CERTIFICATE
Ohio State Bar Association Relator	(Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.)

[Filed Sept. 12, 1975]

Now comes the Relator and alleges that Albert Ohralik, an attorney at Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

On or about February 13, 1974, Respondent learned that Carol McClintock and Wanda Lou Holbert of Chardon, Ohio, had been injured in an automobile accident. He then contacted Albert and Helen McClintock, the parents of Carol McClintock. Upon being informed that Carol McClintock was in the hospital, Respondent went

to see her and advised her as to her legal rights. She thereupon employed Respondent to represent her as to her claims arising out of the accident.

On or about February 13, 1974, Respondent also went to the home of Wanda Lou Holbert and interviewed her regarding the accident. During such interview, Respondent advised Wanda Lou Holbert that she had a good claim for recovery for her injuries as a result of the accident and offered his services as an attorney to represent her. She thereupon employed Respondent.

Relator says that Respondent has violated DR 2-103 (A) and DR 2-104 (A) of the Code of Professional Responsibility.

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/s/ Edward N. Heiser, Esq.
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Counsel for Relator

THE SUPREME COURT OF OHIO
BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE

In re: NO. 229
Complaint against

ALBERT OHRALIK
Respondent

-vs-

ANSWER OF RESPONDENT

OHIO STATE BAR ASSOCIATION
Relator

[Filed Oct. 9, 1975]

Respondent for his Answer to the Complaint herein denies that he violated DR 2-103 (A) and DR 2-104 (A) of the Code of Professional Responsibility.

Respondent furthering answer denies that he violated any of the sections of the Code of Professional Responsibility.

Further answering, respondent states that DR 2-103 (A) and DR 2 -104 (A) of the Code of Professional Responsibility are unconstitutional since they deprive respondent of the rights of free speech as guaranteed to respondent by the First Amendment of the Constitution of the United States and made applicable to the states by the Fourteenth Amendment of the federal constitution; that DR 2-103(A) and DR 2-104 (A) deprive respondent to his right of freedom of speech as guaranteed to him by Article I, Section 11 of the Constitution of the State of Ohio.

/s/ Albert Ohralik
ALBERT OHRALIK
Respondent

/s/ Walter S. Haffner
WALTER S. HAFFNER
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(216) 241-6443

THE SUPREME COURT OF OHIO
BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE

In re: NO. 229
Complaint against

ALBERT OHRALIK
Respondent

-vs-

MOTION TO DISMISS

OHIO STATE BAR ASSOCIATION
Relator

Respondent moves the panel of Commissioners of the Board on Grievances and Discipline to dismiss the Complaint because it fails to state a claim against respondent upon which relief can be granted for the following reasons:

1. DR 2-103 (A) and DR 2-104 (A) of the Code of Professional Responsibility are unconstitutional since they deprive respondent of the rights of free speech as guaranteed to respondent by the First Amendment of the Constitution of the United States and made applicable to the states by the Fourteenth Amendment of the federal constitution.

2. DR 2-103 (A) and DR 2-104 (A) of the Code of Professional Responsibility deprive respondent to his right of freedom of speech as guaranteed to him by Article I, Section 11 of the Constitution of the State of Ohio.

/s/ Walter S. Haffner
WALTER S. HAFFNER
Attorney for Respondent
1008 Standard Building

[Filed: Nov. 17, 1975]

EXCERPT FROM BRIEF IN
SUPPORT OF MOTION TO DISMISS

Respondent, Albert Ohralik, is charged with violating DR 2-103 (A) and DR 2-104 (A) of the Coef of Professional Responsibility. To those charges, respondent has filed a general denial and an affirmative defense. The affirmative defense is that his conduct was and is protected by the First Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment. Also respondent relies upon the Constitution of the State of Ohio, Article I, Section 11.

DR 2-103 (A) and DR 2-104 (A) have been amended since the filing of the complaint herein. DR 2-103 (A) and DR 2-104 (A) can best be summarized as the non-solicitation sections of the Code of Professional Responsibility.

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BEFORE THE BOARD OF COMMISSIONERS
on
GRIEVANCES AND DISCIPLINE
of
THE SUPREME COURT OF OHIO

IN RE:	)	
	)	
COMPLAINT AGAINST ALBERT OHRALIK,	)	
Respondent	)	CASE NO.
	)	229
OHIO STATE BAR ASSOCIATION	)	
Relator	)	

Transcript of proceedings taken before the Panel of The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, consisting of Messrs. Eugene Green, Chairman; Charles B. Zimmerman and Norton R. Webster, Members, on Monday, November 24, 1975, commencing at 9:30 A.M., Room 220, Mott Building, Cleveland, Ohio.

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WANDA LOU HOLBERT

a witness called on behalf of the Relator, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Bell:

Q. Would you state your name, please?

A. Wanda Holbert.

* * * * *

Q. And your address? A. 9397 Madison Road, Chardon, Ohio 44024.

Q. How old are you, Wanda? A. Twenty.

Q. Twenty? A. Yes.

Q. Now, you were involved in an automobile accident on February 2, 1974; is that correct? A. Yes, it is.

Q. Now, as the result of that accident, you were placed in a hospital and then you were later released, and do you remember what date you went home from the hospital? A. February 13.

Q. Of 1974? A. Yes.

Q. Now, prior to the time that you went home had you had any contacts that you can recall with Mr. Albert Ohralik? A. (No response.)

Q. Had you met him before? A. Do you mean in the hospital or–

Q. Well, any place? A. Yes.

Q. What were those contacts? A. I used to walk down to the Post Office in the evening, and him and his brothers would come in and just say hello.

Q. They would say hello? A. Yes.

Q. Did you know him by name? A. No, I didn't.

Q. Did you know he was a lawyer?

A. No, I didn't

Q. Now, were you contacted by Mr. Ohralik on February 13, 1974? A. Yes, I was.

Q. Would you tell the Panel exactly what happened as far as that contact was concerned? A. Yes.

CHAIRMAN GREEN: Excuse me. What date is this now?

MR. BELL: February 13, 1974.

CHAIRMAN GREEN: Go ahead.

A. I was at home and Mr. Ohralik came to my house,

and my brother answered the door.

MR. HAFFNER: I'm sorry. I can't hear her.

THE WITNESS: And Mr. Ohralik came to my house and my brother answered the door, and he came in and told me who he was.

MR. HAFFNER: He was what?

THE WITNESS: He told me who he was, and he asked me if he could represent me as my attorney.

By Mr. Bell:

Q. Now, did you then admit him to your house? A. Yes, I did.

Q. When you went in your house, where did you sit? A. At the dining room table.

Q. Who was there at the table? A. Mr. Ohralik, myself, and my younger sister.

Q. Who? A. My younger sister.

Q. How old is she? A. She's – she will be eighteen this month.

Q. Now, did you discuss your injuries with Mr. Ohralik? A. Yes, I did.

Q. Had you planned to employ him as your attorney? A. No, I hadn't.

* * * * *

13 Q. Were you questioned by Mr. Ohralik regarding the facts of the accident, how it happened, this type of thing? A. Yes.

Q. What did you tell him? A. I told him all that I could remember that had happened.

Q. Would you tell the Panel what you told him at the time? A. You mean about the accident?

Q. Yes.

CHAIRMAN GREEN: Could she speak up, please?

A. I told him that the last thing I can remember was turning onto 44.

MR. HAFFNER: I'm sorry I can't hear her.

THE WITNESS: That the last thing I remember is turning onto Route 44 about the accident.

14 By Mr. Bell:

Q. Then you told him you did not see the other car; is that right? A. Yes.

Q. And you didn't remember anything about the accident; is that correct? A. No, I didn't.

Q. That's what you told him, that you did not remember anything about the accident? A. Yes, that's what I told him.

Q. Then did you have a discussion with him regarding your legal rights as a result of the accident?

* * * * *

A. Yes. Could you repeat it, please?

Q. Would you just simply tell the Panel the additional conversation you had with Mr. Ohralik regarding your medical payment and things like this? A. He told me that – he talked to me and told me all about how I could go about suing the insurance company on an uninsured motorist vehicle, and about my rights and his percentage, and that if I didn't win the case, it wouldn't cost me anything.

Q. Did he tell you what it would cost if he did win the case? A. Yes, he did.

15 Q. What did he tell you? Do you remember how much? A. That he would get?

Q. That he would get if he did win the case?

A. 33 and 1/3%.

Q. At that time did you employ him as your attorney? A. No, I did not.

Q. What was your conversation regarding that?

A. I told him that I would like to discuss it with my mother and my fiance and I would like to talk to him the next day.

Q. Did you talk to him the next day? A. No, I didn't.

Q. When was the next time you talked to him?
A. I think I wrote him a letter.

Q. You wrote him a letter? A. Yes.

Q. What did you say in that letter? A. I told him that I did not wish to sue anyone, and I did not want him representing me as my attorney.

CHAIRMAN GREEN: What was the date of that letter?

Q. Do you remember when you wrote that letter?
A. No, I don't.

CHAIRMAN GREEN: Is it in evidence?

MR. BELL: Yes, it is already in evidence.

16 MR. ZIMMERMAN: Yes, it is in here and it is dated.

By Mr. Bell:

Q. As the result of the letter you wrote to Mr. Ohralik, did you hear anything back? A. Not for some time.

Q. Not for some time? A. Yes.

Q. Did you ever get a response from him?
A. Yes, he sent me a card and forms.

He wanted my signature releasing my hospitalization forms and a release slip like for the doctor, and he wanted my signature on a slip saying that he was my attorney.

Q. Did you sign that slip that said that he was your attorney? A. No, I didn't.

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20 CROSS EXAMINATION

By Mr. Haffner:

Q. Miss Holbert, you and Mr. Ohralik met, you say, February 13, '74, in your parent's home? A. No, my mother was not home.

Q. I said at your parent's home? A. Yeah, yes.

Q. And the only people present at that conversation

you had with Mr. Ohralik at that time and date was Mr. Ohralik and you and your younger sister? A. Sitting at the dining room table. And my boyfriend was sitting on the steps.

Q. He wasn't in the dining room? A. No.

Q. He was sitting somewhere else? A. Yes.

Q. He wasn't part of this conversation? A. No, he wasn't.

Q. He couldn't overhear the conversation?
A. Yes, he could.

Q. Now, are you aware that Mr. Ohralik made a tape recording of that conversation? A. I didn't know he was doing it at the time.

Q. But you are aware that he made one?
A. Yes, I am.

21 Q. You admit that the facts were taken down by Mr. Ohralik on a tape recording? A. Yes.

Q. Would you say that you were more knowledgeable of the facts when that tape was made than you are now? You knew more about the facts of that matter on February 13, 1974, than you do today? A. Yes.

Q. Didn't Mr. Ohralik on that particular day, February 13, come to question you about the facts of an accident involving a Miss McClintock and you and a third party?
A. Yes.

Q. That was the first thing that he asked you, wasn't it? A. He introduced himself.

Q. Well, that's the first thing he asked you after he introduced himself to you, was that he came as the attorney for your friend Carol McClintock? A. He told me that he was representing her and that he would also like to know if I would like to have him represent me—

Q. Now, wait. Answer my question, please.

* * * * *

22 A. He came and said that he was representing my friend, Miss McClintock, and he would also like to know if he could come in and talk to me about representing me.

Q. Didn't he first ask you whether you knew anything about the facts of the matter? A. What do you mean? I don't understand.

Q. Do you understand English? A. Yes, I do.

Q. Did he ask you about the facts of the accident first? A. He asked me what I remembered.

Q. First, right? A. Do you mean after he told me who he was and what he was there for?

Q. Right. A. Yes.

Q. He didn't say anything about he wanted to represent you at that time, did he? A. When he introduced himself?

23 Q. I said at that time. A. Yes, he did.

* * * * *

Q. Let's go back. Mr. Ohralik came and introduced himself as Carol McClintock's attorney; is that right?

A. Yes, he told me he was representing her.

Q. Yes or no? A. Yes.

* * * * *

25 Q. All right. Let's start from the beginning.

Mr. Ohralik came to your parent's home, introduced himself as the attorney for Carol McClintock, right?

A. Yes.

Q. And you let him in the house? A. Yes.

Q. And you went into the dining room? A. Yes.

Q. He went into the dining room? A. Yes.

Q. You seated yourself at the dining room table?

A. Yes.

Q. He had a tape recorder with him? A. I didn't see the tape recorder.

Q. Did he place the tape recorder on the dining room table? A. I didn't even know he had a tape recorder.

Q. Now, when he introduced himself, he said he was Carol McClintock's attorney, right? A. Yes.

Q. And he came there to discuss questions about facts regarding Carol McClintock's accident of February 2nd of '74; isn't that right? He came to ask you about facts regarding Carol McClintock's accident? A. Yes, but can I say something?

26 CHAIRMAN GREEN: Yes.

THE WITNESS: He also came and he asked me if he could represent me as my attorney.

MR. HAFFNER: I object to that part. That is not responsive to my question.

CHAIRMAN GREEN: The answer will stand and the objection is overruled.

Q. Now, the first question he asked you, he told you that he was coming there as Carol McClintock's attorney? A. The first question he asked me?

Q. I mean the first statement he made to you was that he came there as Carol McClintock's attorney?

A. Yes.

Q. He also said he wanted to ask you questions about the accident Carol McClintock was involved in, right?

A. Yes.

Q. You had a conversation with Mr. Ohralik at the dining room table? A. Yes.

Q. You told him that you knew very little about the accident that Carol McClintock had been involved in?

A. Yes.

Q. During that conversation you explained that you knew very little about the Carol McClintock accident, he explained the basis of his representation of Carol McClin-

tock to you; right? A. Could you explain that? What
27 do you mean?

Q. After he listened to your telling him the facts of Carol McClintock's accident, and you explained you did not know anything about it until after, then he explained to you his relationship to Carol McClintock on the basis of the case, right? A. Yes.

Q. After explaining to you the case, he also told you that Carol McClintock had liability insurance which had a coverage for uninsured motorists? A. Yes.

Q. After he explained that to you, he said he could also represent you? A. Yes, he did.

Q. Is it at that time that he made the approach that he could also represent you, right? A. Yes, but he also—

Q. I mean at that time? A. Yes.

Q. Isn't that right? At no time previous to that time did Mr. Ohralik say that he could represent you; is that right? A. No, it's not.

Q. You would say that the conversation took place that's recorded on tape is a better record of your memory
28 than it is today. I have asked you that once before.

* * * * *

Q. Showing you what's been marked Relator's Exhibit 1L, I ask you is this your signature? A. Yes, it is.

Q. Do you recognize it? A. Yes, I do.

Q. Is that a letter you sent Mr. Ohralik?

A. Yes, it is.

Q. On March 14, 1974? A. I don't remember
29 the exact date.

Q. The letter is dated March 14th? A. Yes.

Q. There is a postal mark here. Is this your handwriting? A. Yes, it is.

That's on the envelope?

MR. BELL: Yes.

Q. And a postal stamp on that is March 14, 1974?

A. Yes.

Q. In other words, on March 14, 1974 you wrote Mr. Ohralik a letter dismissing him as your attorney?

A. (No response.)

Q. Yes or no? A. Yes, I did, but could I say something?

* * * * *

Q. Your letter states, "You are not my attorney, that is, if you have told anyone," is that right? A. Yes.

30 Q. Now, February 28, Mr. Ohralik sent you a contract for you to enter into regarding this matter?

A. Yes, he sent me the forms but I don't remember the exact date.

Q. Did you ever return those forms to Mr. Ohralik?

A. No, I did not.

Q. You were eighteen on February 13, 1974; right? You were eighteen years old or more? A. Yes.

Q. While you were talking to Mr. Ohralik on February 13th in your parents home, was the T.V. going?

A. Yes, it was.

Q. Fairly loud? A. I don't remember exactly how loud it was.

Q. Was anybody looking at the T.V.? A. Yes, they were.

Q. Who? A. My younger brother.

Q. Was there anyone else with him looking at the T.V.? A. I don't remember.

THE WITNESS: Could I say something to him?

CHAIRMAN GREEN: No.

Q. When did you first see Mr. Gene Henry, Attorney, in regards to this matter?

31 A. Do you mean the date?

Q. Yes. A. I really don't remember the exact date.

Q. Did you see him before you wrote this letter to Mr. Ohralik on March 14, 1974? A. Is that the letter stating about–

Q. This letter (indicating.) A. No, I wrote the letter before.

Q. I'm sorry I didn't hear you. You wrote this letter before you say Mr. Henry? A. Yes.

Q. Did you see Mr. Henry during the month of March of '74? A. I don't remember.

Q. Did you see him during the month of April, 1974? A. I don't remember. I don't remember what month it was.

Q. You don't remember? A. No, I don't

Q. You couldn't say if I asked you if it was May? Would that refresh your memory?

MR. HEISER: Objection. She has already said she doesn't remember.

CHAIRMAN GREEN: She may answer that question if she can.

THE WITNESS: No.

32 By Mr. Haffner:

Q. You say Mr. Henry. Was that the first time regarding this matter that you had seen Mr. Henry?
A. Yes, it was.

Q. Were you acquainted with Mr. Henry before that?
A. I had heard his name before, but I had never met him before.

Q. In what respect did you see Mr. Henry regarding this matter? A. I went up to see if there was anything I could do to have Mr. Ohralik release it so that the insurance company would pay my medical.

Q. You saw him just as an attorney? A. Yes.

Q. Did you enter into any agreement with Mr. Henry regarding this matter? A. What do you mean?

Q. I said did you enter into an agreement with Mr. Henry regarding this matter? A. No.

Q. Any oral agreement or written agreement?
A. I filed a complaint.

Q. When you went to see Mr. Henry, you didn't go to file a complaint, did you? A. No.

33 Q. You went there to see him as an attorney?
A. Yes.

Q. To help you in this matter? A. Yes.

* * * * *

36 Q. Miss Holbert, I am reading now what has been identified as Relator's Exhibit 2, which is a transcript of the tape that has been offered into evidence by these gentlemen here as Relator's Exhibit No. 5.

The first thing according to this transcript is, "We . . . ah they asked me to go and talk with Carol. They said that this drunk didn't have any insurance. No. Well, it's not that bad, see. . . Of course, they've hired me as their lawyer. I'm Carol's lawyer not."

Is that your recollection of the first words of Mr. Ohralik? A. No.

Q. This transcript is incorrect then? A. What do you mean?

Q. I said is this correct or incorrect? A. It's incorrect.

Q. Incorrect? A. Yes, it is.

* * * * *

44 REDIRECT EXAMINATION

By Mr. Bell:

Q. The tape recording that you are reading there, Wanda, the transcript that you have in your hand, I would like you to look at the very beginning of it.

Is that the first conversation that you had with Mr. Ohralik? A. No.

Q. Would you tell the panel if you remember, approximately what time he first arrived at your home until this conversation as recorded started? Do you have any idea? A. Could you explain that? Could you repeat that?

Q. From the time he knocked on your door, do you know what interval there was until this conversation that's typed there, right at the beginning was started between the two of you?

MR. HAFFNER: I object. She doesn't know anything about a tape recorder.

CHAIRMAN GREEN: She may answer.

A. Yes, he talked to me at the door and stepped inside the door and talked to me a few minutes before we sat down.

* * * * *

45 Q. What length of time was there when he first knocked on the door and the conversation that is typed on that Exhibit started? A. About ten minutes, I think.

Q. About ten minutes? A. Yes.

Q. Now, did you testify earlier that you did not know that there was a tape recording being made?

A. Yes, I did.

Q. That's correct? A. Yes.

Q. Do you know how a tape recording could have been made? A. Yes.

Q. How? A. He could have had the tape recorder hidden.

Q. He could have had it hidden? A. Yes.

Q. When did you learn that there was a tape recording of your conversation? A. When Mr. Hegele came to talk to me.

Q. Now, would you again state for the panel, you mentioned there was a five to ten minute interval between

46 when the tape recording started and the knock on the door? A. Yes.

Q. Would you briefly tell the panel what occurred during that period? A. Mr. Ohralik stepped inside the house and told me who he was and that he was representing Miss McClintock as her attorney, and that he had talked to her about the accident and that he would also like to talk to me about it and represent me as my attorney.

Q. Then you brought him in the house and you sat down at the table? A. Yes.

Q. Was there any other conversation that you remember that is not on that transcript? A. No.

Q. Excuse me? A. On this?

Q. Before that, from the time he knocked on the door until this started, do you remember any other conversations? A. He asked me how I was feeling and—

Q. When would be the first time that you know of that anyone involved in this entire thing informed Mr. Ohralik that his services were not wanted by you?

A. The next morning.

47 Q. The next morning? A. Yes.

Q. That would be February 14th? A. Yes.

Q. Do you know how that was communicated to Mr. Ohralik? A. Over the phone.

Q. By whom? A. My mother.

* * * * *

CROSS EXAMINATION

By Mr. Haffner:

Q. You just testified you never saw that tape recorder; isn't that right? A. Yes.

Q. You don't know, do you, when that tape recorder was put on to tape the conversation? A. No.

48 Q. So you don't know whether that tape recorder was on when Mr. Ohralik came to your door on February 13th?

* * * * *

A. I can tell that it wasn't it, this is the beginning of the tape, because we had a conversation before this.

Q. You don't know whether it was on then before that? A. No, I don't.

Q. During the entire conversation then with Mr. Ohralik, you never saw a tape recorder? A. No, I didn't.

Q. And you don't know when Mr. Ohralik turned that tape recorder on, do you? A. No.

Q. Now, on February 14, you testified that your mother called Mr. Ohralik? A. No. Mr. Ohralik called my mother – called the house for me but my mother talked to him.

Q. Your mother spoke on the phone? A. Yes.

Q. You did not hear the conversation, right?

A. No, I didn't.

Q. You don't know who was calling? A. At the

49 time, I didn't know.

Q. All you know is what your mother told you, right? A. Yes.

* * * * *

MARIE HOLBERT

a witness called on behalf of the Relator, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Heiser:

Q. Would you please state your name and your address? A. Marie Holbert, 9397 Madison Road, Chardon, Ohio.

MR. HAFFNER: I didn't get your first name.

THE WITNESS: Marie Holbert.

Q. Are you married? A. No, I am a widow.

50 Q. How many children do you have? A. Eleven.

Q. How many children live at home? A. Five.

Q. And you are the mother of Wanda? A. Yes, I am.

Q. Do you know Mr. Albert Ohralik? A. No, I don't.

Q. Have you ever met him personally? A. No.

Q. Have you ever had a conversation with him?

A. Just on the phone.

Q. How many times? A. Once.

Q. When was that? A. That was February the 14th.

Q. Which year? A. 1974.

Q. Can you tell the panel how that phone conversation came about? A. Well, he called on the phone. He said he wanted to talk to Wanda. I said, "Well, Wanda is not feeling too good. She is lying on the couch."

He said, "I would like to talk to her about being her lawyer." I said, "Well, I am sorry. We're not suing any-

51 body," and I said, "if we do sue anybody," I said, "we have our own lawyer and we will get in touch with him."

And he said, "well, Wanda is eighteen years old. She's her own boss and I would like to talk to her." I said,

"I'm sorry. We talked it over and we don't want to sue nobody, and we don't want you as a lawyer."

Q. What did he say? A. He says, "Well, Wanda is eighteen. She is her own boss and she can talk for herself."

Q. Was that the end of the conversation? A. No, he says that, "did you know you could sue McClintocks," and I said, "I don't have any intention of suing anyone."

He said, "I saw an insurance policy that McClintocks have, and you can sue them for more money than you got," and I said, "I don't want to sue nobody."

Q. Was that the end of the conversation?

A. No. He said, "Well, Wanda gets to feeling better, I would like for her to call me back." I said, "all right."

Q. Did you hang up then? A. Yes, I did.

Q. Have you had any conversation with him since that time? A. No, sir, I have not.

* * * * *

61 GENE HENRY

was called as a witness on behalf of the Relator, being first duly sworn, testified as follows.

DIRECT EXAMINATION

62 By Mr. Bell:

Q. Mr. Henry, would your name and address, please, for the record? A. Gene Henry, 8266 West Hill Drive, Chagrin Falls.

Q. What is your occupation? A. I am an attorney.

Q. And is your law office in Chagrin Falls?

A. No, it is in Chardon, Geauga County.

Q. Are you acquainted with or have you met Marie Holbert and Wanda Holbert? A. I believe I am. I believe they are the people that are waiting out in the hall with me, and I believe they have both been to my office at least once.

Q. Do you recall when they came to your office initially? A. I might be able to refresh my memory, if I may. I did bring my file.

(Witness examines file.)

A. (continuing) Wanda Holbert signed a form for a Grievance Committee on April 23, 1974 and I believe that was probably the first time I saw her. I may have talked to her or her mother on the phone prior to that.

Q. What is your connection with the Grievance Committee? A. I was the chairman of the Grievance Committee at that time.

Q. Of the Geauga County Bar Association?

A. Yes.

63 Q. And they filed a Complaint with you; is that correct? A. Yes.

Q. Against whom was that complaint?

A. Against Albert Ohralik.

Q. What was the substance of the complaint?

A. I would–

MR. HAFFNER: I object. The complaint speaks for itself.

CHAIRMAN GREEN: He may answer.

A. The main substance of it was that he had solicited – they claimed he had solicited their case in a personal injury automobile case, and that would be the girl for her injury.

Q. That would be Wanda's case; is that correct?

A. Yes.

Q. Did you have any conversations with Mr. Ohralik as a result of that complaint being filed with you?

A. Yes, I believe I did.

Q. Could you tell the panel approximately when and what those conversations consisted of? A. Again, may I refer to my files as to the dates?

(Witness examines file.)

A. (continuing) I believe one of the things I was attempting to accomplish for Wanda Holbert was the fact that the Insurance Company was willing to pay her money for her
64 injuries, but they were – she claimed that Mr. Ohralik did not represent her and Mr. Ohralik claimed that he did, and the insurance company was unwilling to release a check under that situation; and I believe that right around that time, the date of the signing of the complaint, April 23, 1974, I must have talked to Mr. Ohralik on the phone right around that time on possibly two occasions.

Q. Regarding that problem; is that correct?

A. Yes.

Q. Did you have any correspondence to or from him at approximately that time? A. Yes. On May 30, 1974 – or on May 31st I received a letter from Albert Ohralik dated May 30th.

Q. What was the substance of that letter? A. It was a letter from Mr. Ohralik in response to a letter I had written to him on May 24th.

I wrote to him on that date that I had been informed by Miss Holbert that although Mr. Ohralik was not her attorney, the insurance company will not pay her loss of wages claim without a release from Mr. Ohralik.

I said, "I hope that this was an oversight on your part, and you will immediately notify the insurance company," and in response to that letter, he wrote to me. Shall I read that?

Q. Yes, please do? A. This is the letter dated
65 May 30th.

"I have your letter of the 24th instant written on behalf of Wanda Lou Holbert.

I direct Wanda Holbert to send to me $2,466.66. Upon Miss Holbert's payment to me the sum of $2,466.66,

I will acknowledge receipt thereof and I will disavow further interest and claim in her matter.

Our attorney-client employment agreement provided for payment to me of 33-1/3% of the money that I would recover for she.

The claim was conservatively worth $7,400.00. I have rendered counsel to her great benefit, and I was diligently performing on her behalf in obedience to my obligation, and I was ready, able and willing and zealously disposed to continue a vigorous representation on her behalf when she wrongfully discharged me from this employment.

A lawyer wrongfully discharged from his employment is entitled in damages the amount that he would have received pursuant to performance in compliance with terms of his contract." There is a note and he gave some legal citations.

Q. That was received by you on what date?

A. May 31st.

* * * * *

70 CROSS EXAMINATION

By Mr. Haffner:

Q. Mr. Henry, did Marie Holbert and Wanda Holbert or both or one come to your office on April 11, 1974?

A. I don't have any specific memory of that as to whether they did or not as to the date.

Q. On that April 12th letter, I believe it is Exhibit 8, there were five forms enclosed. Were they completed or blank? A. I believe that they were blank at that time. I state here, "which have to be filled out."

Q. I just asked a question, were they completed or blank? A. I believe they were blank, but I can't be certain.

Q. At any time prior to April 23, 1974 did Marie Holbert or Wanda Holbert visit your office? A. I don't know. I can't say for sure.

Q. Is it true that on April 23, 1974 Wanda Holbert and Marie Holbert visited your office in Chardon, Ohio? A. If that is the date of that complaint that was signed
71 by Wanda, yes, that would be true then.

Q. Did they bring any forms with them? A. I don't specifically recall whether or not they did. I assumed from that correspondence that they must have.

Q. You conversation was first with Marie Holbert; is that right? A. I believe so.

Q. By telephone? A. Yes.

Q. I believe Marie Holbert was concerned about Wanda Holbert getting her hospital bill paid for; is that right? A. I believe so.

Q. And Marie Holbert stated to you over the telephone that Albert Ohralik supposedly represents her daughter, Wanda Holbert, but that is not true; is that right? I'm sorry if you didn't follow it, I will have it repeated.
A. I follow it. I don't know whether it is true or not, but I do know she told me that she had not obtained Ohralik.

Q. They wanted to get rid of Albert Ohralik as supposedly their attorney in a matter of a claim for personal injury? A. Well, as I had indicated earlier, they were not able to collect this money because of the confusion as to whether or not Albert Ohralik represented them or not, and they always maintained he did not.

Q. But the first contact with your office was to resolve this difference with Mr. Ohralik's supposed represen-
72 tation of Wanda Holbert? A. Yes.

Q. There is no listing in the telephone book of Chardon, Ohio as you being Chairman of the Grievance Committee of the Geauga County Bar Association.

MR. HEISER: I object.

THE WITNESS: Incidentally, I'am not chairman now.

CHAIRMAN GREEN: Sustained.

Q. Didn't the Holberts come to you initially as an attorney and not as a member of the Grievance Committee? A. I don't believe so. I think they inquired and found that I was the chairman of the Grievance Committee.

Q. You don't know really? A. I am rather certain they came to me in that capacity and not as a private attorney.

Q. Did you state to Mrs. Marie Holbert when you had your telephone conversation wtih her initially that you had been trying to find somebody to file a complaint against Albert Ohralik?

CHAIRMAN GREEN: You may answer.

A. I don't believe. I am rather certain I did not and would not have said that.

* * * * *

89 CAROL McCLINTOCK

a witness called on behalf of the Relator, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Heiser:

Q. Carol, would you please state your name and your address? A. Carol McClintock, 9520 Madison Road, Montville, Ohio 44064.

Q. What is your age? A. 20.

Q. Are you employed? A. Part time for State Farm Insurance.

Q. Referring back to February of 1974, were you in an automobile accident? A. Yes, I was.

Q. Where did that accident happen approximately? A. State Route 44 and Girdled Road in Concord Township.

Q. That's in Ohio? A. Yes.

Q. What county was that? A. That's Lake County.

Q. As a result of that accident, you were hospitalized?

A. Yes, I was.

90 Q. How long were you in the hospital A. Six weeks.

Q. During that six weeks, did you have surgery?

A. Yes, I did.

Q. How many times? A. Once.

Q. What was the date of that accident? A. February 2, 1974.

Q. Prior to February 2, 1974, did you know a Mr. Ohralik? A. Just by name and knowing that he lived in the town.

Q. Is that Albert Ohralik? A. I don't know him by his first name. I just know him by Mr. Ohralik.

Q. Do you see him here in the courtroom today?

A. Yes. (Indicating)

Q. Prior to February 2, 1974, did you know that he was an attorney at law? A. No, I didn't.

Q. Following the February 2nd accident of 1974, did you meet Mr. Ohralik or have occasion to see him?

A. He came up to the hospital to see me.

MR. HAFFNER: Object to the answer. It's not in response to the question.

91 CHAIRMAN GREEN: That was not responsive. Would you read the question to the witness?

(Question read.)

By Mr. Heiser:

Q. After February 2, 1974, did you have occasion to meet Mr. Ohralik? A. Yes, that's when he came to the hospital to see me.

Q. He came to the hospital to see you, and what approximate date was that; do you recall? A. February 15.

Q. About February 15, 1974? A. Right.

Q. Would you relate to the gentlemen on the Panel here what transpired at that meeting, what Mr. Ohralik said to you and what you said to Mr. Ohralik?

MR. HAFFNER: Objection, your Honor. I would rather have it done in the form of questions and answers rather than a narrative.

CHAIRMAN GREEN: Overruled. She may answer.

THE WITNESS: Could you repeat that.

Q. Tell the gentlemen of the Panel what Mr. Ohralik

92 said and what you said at that meeting in your room at the hospital on about February 15, 1974. A. He came into the hospital and told me that he was a lawyer and that he had talked to my mom and dad; and they called me and said that he had been to the house and that he wanted to come up and talk to me; and that he came up – well, he came up to the hospital and said that he was a lawyer and that he had heard at the Post Office that I had been in a car accident and that I would need a lawyer.

He said that my bed was by a window overlooking the emergency entrance to the hospital when the ambulances came in, and that he had cards with him, and he said that I could chase ambulances for him, and he gave me some cards.

Q. Did you tell him during that meeting that you knew another lawyer that you wanted to hire?

A. I don't remember.

Q. Did he have any written documents with him?

* * * * *

93 A. He had some typing paper with a contract written up on it, you know, typed up on it.

Q. What did he do with that? A. Well, he read it to me and told me that he was a lawyer and asked me if I would like to have him to take my case.

Q. What did you tell him? A. That I wanted to talk to my mom and dad first.

Q. What did he say? A. I don't remember.

Q. Did you sign this contract? A. Yes, I did.

Q. Did you sign it that day? A. I signed it February 15.

Q. In the room there at the hospital? A. Yeah.

Q. Did Mr. Ohralik call you at the hospital before he came over? A. I don't remember whether he did or not.

Q. But it was not until after this accident that you knew that Mr. Ohralik was an attorney at law?

MR. HAFFNER: Object. That's been answered.

CHAIRMAN GREEN: There is no harm in the

94 answer. He has already answered.

A. That's right.

Q. How long was Mr. Ohralik in your room that day? A. I would say approximately a half hour, 45 minutes.

Q. What did he say when he left about what he was going to do for you?

* * * * *

A. He said that he would have to, you know, get the insurance stuff and papers and find out what kind of coverage of insurance that there was, and that he would take care of everything and let me know what was going on.

Q. Now, from February 15 until March 15 you stayed in the hospital? A. Yes, I did.

Q. Did you see Mr. Ohralik again while you were

95 still in the hospital? A. Yes, I did.

Q. Did he come to see you again? A. Yes.

Q. When was that? A. I don't remember.

Q. Approximately how many days or weeks after the first time, if you can remember? A. It could have been approximately two weeks.

Q. What was the occasion of that meeting?

A. He brought some fruit, a bag of fruit up to the hospital, and he took pictures of me in traction and my eye, where my face was cut up, and my legs.

* * * * *

96 Q. Did you hear from him again while you were in the hospital from February 15th until you were discharged from the hospital, either verbally or in writing?

A. I'm not positive, but I think he might have mailed papers up to get a release from the doctors for information.

Q. After you were discharged from the hospital, when was the next time that you had occasion to see Mr. Ohralik? A. He came up to my apartment.

Q. Do you remember approximately when that was?

A. No, I don't.

Q. What was the purpose of his coming up there or do you remember what happened? A. I think he just came up to talk to me to, you know, tell me what he had done, that he took pictures of the accident and stuff and got my stuff, my clothes and stuff out of the trunk of my car from where they had towed the car away.

Q. When was the next time that you saw him?

97 A. Then I didn't hear from him. I called his office and I couldn't get ahold of him. I called his house to find out what was going on, if anything was being done about the accident, and I couldn't get ahold of him.

So a friend of mine came over, and he carried me downstairs, put me in the car, and I asked him if he would drive me out to this house; and I went out to his house. I was in a body case and he was at his home, and I asked him if the insurance was taking care of the bills because I was getting bills saying that people, you know, the hospital and different people were going to sue me.

He said that the insurance wasn't going to pay the

hospital bills and that I should ask my doctor for a walking cast so I could go back to work so I would get my bills paid.

Q. What did you say to him? A. I got mad and we left and that's when – you know, because I hadn't been able to get ahold of him, and the office numbers that I had that his brother had given me, I called and there was never no answer, and that's when I had my brother take me into Cleveland to talk to John Brown.

Q. Then what did you do as far as Mr. Ohralik is
98 concerned? A. He sent a letter with papers and I think there was six copies or three copies – I am not sure – to get to release information from the doctors so that he could get that information, and I never sent them to the doctors or anything.

He told me to call the doctors and find out what extent of damage there was to me, and I never did have the papers signed, and that's when I had my brother take me into Cleveland because I felt if he told me that I could get a walking cast and go back to work with two broken legs, that I didn't need him for my attorney.

Q. What did you do then as far as Mr. Ohralik is concerned? A. I went into Cleveland and talked to John Brown, and we wrote a letter to Mr. Ohralik and mailed it to him.

* * * * *

Q. Did you keep a copy of that letter?

A. Yes, I did.

Q. Do you have it with you? A. No, I don't.
99 It's at home.

Q. Can you relate to the panel what the letter said?

* * * * *

A. I wrote to Mr. Ohralik that I no longer wanted him for an attorney, that I had went and talked to John

Brown from Cleveland and that I would like to have him take over my case, and that when I signed the contract I was under the influence of drugs, and I wasn't sure if that's what I wanted, if I wanted him as my attorney; and if he would release the information to John Brown saying that I no longer wanted him for my attorney and that I wanted John Brown to take over the case.

Q. Did you hear from Mr. Ohralik in response to
100 that letter?

* * * * *

A. Yes, I did. He mailed me a letter saying – it was a three-page letter, and he told me that I had hurt my mother's feelings when I told her I wasn't going to return home to her home when I got out of the hospital, because I had an apartment set up for me, and that Wanda was staying at my apartment, you know, helping me. And he said that he felt that she shouldn't have been there help-
101 ing me because when he saw her she was shuffling around on crutches, and that in the position she was in, she needed help herself; and that's when he brought up the part about the fruit that he bought.

He said that I seemed to enjoy the fruit that he brought to the hospital, and he said that I owed him the $4,166.66 prior to the contract that he had made with me saying that he would get 33-1/3 per cent of the money that was recovered from the accident.

He said that he had called the apartment one time and Wanda answered the phone and said that I wasn't in the room because I was in the bed laying down, but he must of misinterpreted it, but he said that he knew that I wasn't supposed to be walking, which I wasn't.

I was in a body cast and a wheelchair, so it would have been hard to walk. And he said that if I had been in the other room and couldn't come to the phone, that

it led him to believe that I was like disobeying the doctor's orders, and that how can I say this –

MR. HAFFNER: I didn't hear that.

A. – that I was more or less saying the insurance wouldn't actually pay the bills because I was abusing myself; that I was walking when I wasn't, and that I had owed him the money. That was about it.

102 Q. All right. Now, referring back to the time period prior to your accident, this would be prior to February 2, 1974, would you tell the Panel the extent of your contact with Mr. Ohralik, if any? A. My father bought a car from him I'd say approximately seven years ago, and we bought a Christmas tree because he sells Christmas trees, and that was a long time ago.

The only other time that I had seen him was at the Post Office when I was getting our mail because we have a post office box.

Q. You on occasion would bump into him in the Post Office? A. Yeah, that's the only time. I didn't go to his house and visit him or nothing.

* * * * *

Q. But prior to the accident you did not know personally that Mr. Ohralik was an attorney at law?

A. No.

* * * * *

103 CROSS EXAMINATION

By Mr. Haffner:

Q. It's still Miss McClintock, isn't it? A. Yes, it is.

Q. You live at 9520 Madison. Is that where you live? A. Madison Road.

* * * * *

104 Q. That post office you were referring to is at the
105 intersection of U.S. Highway No. 6 and State Route 528? A. Yes, it is.

Q. And you went and picked up the mail for your family. Does that mean your parents and your brothers?

A. Could you repeat the question?

Q. Did you pick up the mail for your parents and brothers at that post office? A. Yes, I–

* * * * *

Q. Before February 2nd, '74, you went to that post office and picked up the mail; is that right? A. Yes.

Q. Would you say you went there about at least three times a week? A. It depended. I mean, different people in my family checked the mail, not only did I check the mail.

Q. You went there on an average of three times a week to pick up mail? A. Twice a week.

106 Q. Mr. Ohralik also lives in Montville, doesn't he?

A. Yes, he does.

Q. You met Mr. Ohralik at this post office picking up mail? A. Yeah.

Q. And you met Mr. Ohralik for a number of years prior to February 2nd, '74 at the post office, when he was picking up his mail and you were picking up your mail and your parents' mail? A. I didn't pick up his mail.

Q. You met Mr. Ohralik prior to February 2nd, '74, at this Montville Post Office while you were picking up your mail and Mr. Ohralik was picking up his mail?

* * * * *

A. I have seen him at the post office.

Q. I said you met him. Did you talk to him?

A. You know, hello.

Q. Did you talk to him about anything else besides
107 just saying hello? A. Not that I recall.

Q. You didn't have any conversations with him at the post office besides saying hello? A. I might have talked about the weather or something, but nothing personal.

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133 EXAMINATION

By Mr. Zimmerman [Panel Member]:

Q. How much did you pay Mr. Ohralik?

A. $4,166.66.

134 Q. You paid him $4,166.66? A. Yes, I did.

Q. Was that as a result of a suit against you by him?

A. Yes.

Q. Was there a judgment rendered for him for that amount? A. I don't understand.

Q. Did the Court order you to pay this? A. Yes.

Q. The judgment was in his favor against you, then?

A. (No response.)

Q. Do you understand what I am saying? A. Yes.

Q. You paid him $4100? A. Yes.

Q. The first time you actually met him was in your hospital room on February 2nd; is that correct?

A. Well, no; I had seen him.

Q. I mean, met him formally; you were introduced to him, or was that the first time this happened in February, 1974? A. Yes.

Q. You had seen him occasionally in the post office?

135 A. Yes.

Q. But you had never been introduced as being Carol McClintock until February 2, 1974? A. February 15th.

Q. I'm sorry. February 15th? A. Yes.

Q. So as far as any formal meeting was concerned,

it was February 15, 1974 that you actually met him?

A. Yes.

Q. Even though you knew who he was? A. Yes.

Q. Did you know he was an attorney before February 15, 1974? A. No.

Q. Do you recall him making a statement to you about cards and ambulance chasing at that time?

A. Yes.

Q. You really recall that? You said you were vague about some things? A. Yes, I do.

Q. What was your response to that? A. I don't think I said anything to him.

* * * * *

136 EXAMINATION

By Mr. Webster [Panel Member]:

Q. In connection with this business of giving out his cards, you said your bed was near the window and it overlooked where the ambulances came in?

A. That's right.

Q. And he suggested that you take his cards and give them to people who came in on the ambulances; is that right? A. Yes.

Q. How did he expect you to do that when you were in a cast in bed? A. I have no idea.

Q. He did leave those cards? A. Yes, he did.

Q. Do I understand correctly that he had talked with your parents before he came to see you in the hospital? A. Yes.

Q. Is it your impression that he came to see you at their suggestion, at your parents' suggestion? A. No, because my parents said that I was 18, that it was my decision; that they couldn't tell him if I could hire him or not. It was my decision.

Q. So he came to see you there not at their sugges-

137 tion? A. No.

Q. Is that what you are telling me? A. No.

Q. Did he indicate to you when he came in to see you in the hospital the first time as to whether they had sent him to see you? A. Not that I recall.

Q When he first came in to see you in the hospital, did he state why he was there to see you? Did he say why he had come to see you? A. He told me that he had heard I was in an accident, and that I was 18, and it would be my decision if I needed an attorney or not.

Q. Did he ask you flat out that he wanted to represent you or did he say that he had talked to your parents? I am trying to get at what he specifically said when he came in the room. A. He said that he was an attorney and that I would need an attorney for the accident, you know, because of the accident, and asked me if I wanted him to be my attorney; and that I told him I wanted to talk to my parents to see what they thought about it. But my parents told me it was my own judgment, that I was 18, an adult, and they was leaving it up to me.

138 Q. All right. So after having left it up to you, you decided to engage him; is that correct? A. That's correct.

Q. You finally then did settle your claim with the insurance company; is that right? A. You mean through him?

Q. No; you finally got paid by the insurance people for some amount of money? A. Yes.

Q. And you did that initially with his assistance and later on with Mr. Brown's assistance; is that correct? A. Yes.

Q. Did you pay Mr. Brown any money? A. Yes, I did.

Q. Then is it my understanding that Mr. Ohralik then sued you for his representation in connection with that claim? A. Yes, he did.

Q. And that was the case that you responded to Mr. Zimmerman's questions about that the Court ordered you to pay the 4,000 and some odd dollars? A. Yes.

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EXAMINATION

By Chairman Green:

139 Q. Again going back to the original visit, did your parents call you before Mr. Ohralik visited you in the hospital? A. Yeah.

Q. Did they tell you that he was on his way to see you? A. They said that he wanted to come down and see me.

Q. Did they tell you that they had given him permission to come see you? A. No, that was my decision.

Q. Did they alert you or advise you that he was going to see you? A. Yes.

Q. So that when he came you were expecting him, is that correct, as a result of that phone call? A. Yes.

Q. All right. Now, one other question with respect to the cards that he left with you.

How many cards do you recall him giving to you? I am not asking for the precise number. A. Approximately five or six.

Q. Did he ever refer to that matter again after he left the cards with you? A. Not that I recall.

140 Q. Never asked you whether you had contacted anyone who had arrived at the hospital in the emergency vehicles? A. No.

Q. That was the only reference with respect to chasing for him that one day, the first time that he was with you? A. Yes, that I recall.

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Q. So that the record may be complete, how much did you pay Mr. Brown for services in connection with the same accident case you paid Mr. Ohralik? A. $900.

Q. And the actual settlement, the negotiations that took place with the insurance company was made through Mr. Brown? A. Yes, it was.

CHAIRMAN GREEN: Thank you.

MR. HEISER: I must ask the witness two or three questions, if the Panel will permit, because I believe that she misunderstood Mr. Zimmerman in one of his questions and I want to make it clear to the Panel exactly what happened.

CHAIRMAN GREEN: Go ahead.

REDIRECT EXAMINATION

By Mr. Heiser:

141 Q. Mr. Ohralik filed a lawsuit against you in the Common Pleas Court of Lake County or Geauga County?
A. Yes.

Q. For his fee? A. Yes.

Q. And you engaged Mr. Brown to defend you in that lawsuit? A. Yes.

Q. Did that lawsuit ever go to trial, to court, where you had the trial and the witnesses and so on?
A. No, it didn't.

Q. You settled the case? A. Yes.

Q. Before the trial. In other words, you told Mr. Brown to go ahead and pay Mr. Ohralik his money?
A. Yes.

Q. And so there was no trial? A. No, there wasn't.

MR. ZIMMERMAN: There was no judgment.

CHAIRMAN GREEN: Thank you.

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144 HELEN McCLINTOCK

a witness called on behalf of the Relator, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Bell:

Q. Could you state your name for the Panel, please?
A. Helen McClintock.

Q. Your address? A. Box 54, Montville.

Q. What's your street address? A. Route 528. My house number is 9520.

Q. What's the street name? A. Route 528 – Madison Road. I was trying to think what street number.

Q. And you are the mother of Carol McClintock, is that right, the girl who just testified? A. Yes.

Q. Calling your attention to on or about February 2, 1974, was Carol involved in an automobile accident?
A. Yes, sir.

145 Q. Where was that? A. On Girdled Road off of 44.

Q. Now, prior to that date, were you acquainted with or did you know Mr. Albert Ohralik? A. I knew their last names. I had seen him approximately a dozen times.

Q. You said "their last names." Who are you referring to? A. Ohraliks. I never knew their first names. I knew Louie, but–

Q. Did you know Albert Ohralik? A. Not personally, no.

Q. How many are in the Ohralik family, if you know?
A. I always thought there was three, but I found out there was four

Q. Four what? A. There was three boys and a father.

Q. Did they live near you? A. They live east of me on Route 528 – or 6. I'm sorry, Route 6.

Q. What direct contact have you had with Albert Ohralik prior to February 2, 1974? A. Oh, we bought a Christmas tree off of him, I think, about four or five years ago, and we bought a car, a station wagon I believe it was, off of him.

146 Q. Had he ever been your lawyer prior to February 2, '74? A. No, I didn't even know he was a lawyer.

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Q. After February 2, 1974, did you contact Mr. Albert Ohralik? A. No, he contacted me. He called me.

Q. He called you on the telephone? A. Yes.

Q. Do you have any idea as to when that was?

A. I think it was the 13th of February. I wouldn't swear to it, but I believe it was the 13th.

Q. What did that conversation consist of?

A. Oh, "I heard your daughter was in an accident."

Q. Would you say who said what, please?

A. Mr. Ohralik said, "I heard your daughter was in an accident."

I said yes, and he said, "What's wrong?"

I said, "Well, she has two broken legs, face laceration, contusions, eye trouble," and I don't know just

147 what all there was, but he wanted to know if he could go and see her, he might be of some help to her.

I said, "I don't know. You can go see her as far as I am concerned." He says, "Well, does she need a lawyer?" and I said, "Well, when I was in the hospital to see my daughter, a traction fell on her," and the supervisor of the hospital took me outside and said, "Look," he says, "you might be able to sue," and he says, "if you want to."

I said, "Look, I don't sue nobody for nothing. That's the girl's business in there. If she wants to sue if she got hurt, that's up to her."

So he said, "Well, I know a good lawyer." He told me a lawyer that he was with, and I don't even remember the name, but I got the name somewhere at home.

Q. Who are you talking about? A. This supervisor of all the hospitals in Geauga County – Humbledink – Mr. Ohralik probably knows him.

Anyway, to me he said, "Well, you know, you may have probable cause for–

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149 Q. Would you proceed with your indication to the Panel as to what your conversation on the telephone was on February 13th? A. Well, I can't remember in detail every bit of it, but I can remember some of it. He asked me if he could come over to the house and talk with us.

First he says, "Do you have any insurance?"

I said, "Yes, we're covered." He said, "Was the car Carol's or was it your?"

I said, "No, it was ours."

So we talked a little bit about her health and this and that and things in general, things pertaining to her health and the automobile accident, and he said that he was a lawyer and that he could take care of all that kind of stuff.

I said, "Well, if I need a lawyer –" oh, I was talking about the traction. That's where it came in. I was talking about the traction, and he said, "You might need a lawyer. That might be a case for suing."

I said, "Well, if there is any suing to be done, my daughter will have to do it. She's 18 years old. I cannot do it. I cannot give you permission."

Q. Was there anything else in that telephone conversation? A. Oh, yeah. He talked with us about – I think he said that he worked with insurance or knew about

150 insurance claims and everything and he could do as good as anybody else could and so on and so forth.

Q. Did you agree then to allow him to come over to your house? A. Yes.

Q. Did he come to your house that day?

A. Yes, he did, and he went from my house right up to Holbert's.

Q. When he came to your house, what did he talk about? A. Well, he talked about the accident, and he more or less was looking at the insurance papers.

Q. He reviewed insurance papers with you?

A. Yes. He didn't review them; he looked over them and wrote a bunch of stuff down. I didn't even get to read it and my husband didn't either.

Q. At the time he came to your house, had he been to see Carol, if you know? A. No, he had not, not that I know of.

Q. This was on February 13th? A. 13th. See, I know that because Wanda got out of the hospital on the 13th, and when she came home, she come home that day and he went up there the same day.

He went from our house, and I even told him how to get up to Wanda's.

151 Q. He went from your house to Wanda's?

A. Yeah, because he didn't know where Wanda lived.

Q. While he was at your house, did you give him your insurance policy? A. I gave him a rider; I didn't give him the original policy because I couldn't find it. I later think it was found in the vault.

Q. Did he have a copy of the accident report with him? A. Yes, he did.

Q. Did you then at that time or thereafter talk to your daughter about him? A. She called me and said, "Mom, Ohralik was down to see me." She said, "What should I do?"

I said, "I leave the decision up to you."

She asked her dad and he said, "You've got to start making some decisions of your own sooner or later." We told her it was up to her, whatever she wanted to do.

Q. Did you talk with Mr. Ohralik after the February 13th visit to your home? A. Yes, a number of times. We took papers and things over for him, and he had copies, photostatic copies made up for me, and whatever, you know, whatever we learned, we would have photostatic copies made up and we would have to send things to her, and we had

152 copies made.

Q. Did you have any contact with Mr. Ohralik prior to February 2nd of '74 at the post office?

MR. HAFFNER: Object.

A. Well, I might have, you know, said hello or something like that, good morning, good afternoon, what have you.

I mean, no personal relationship of any kind, no friendship, what you would really say friendship; no.

* * * * *

162 Q. Did you make a phone call to Carol McClintock at the hospital that Albert Ohralik was going to see her on February 13, '74? A. I made a phone call. It was somewhere between the 13th and the 15th. I couldn't tell you exactly.

Q. That Mr. Ohralik was going to visit her? A. Yes.

Q. And he was going to discuss whether she needed an attorney? A. Yes.

Q. And you testified, I believe, that the decision was up to her? A. That's correct. She was 18.

Q. Did you tell Mr. Ohralik to go down and see

163 Carol McClintock on either February 13th or February 15th, '74? A. I told him that it was up to him.

If he wanted to go see her, it was fine with me.

ary 15th, '74? A. I told him that it was up to him. If he wanted to go see her, it was fine with me.

Q. You also told your daughter Carol that he was coming to see her either on the 13th or the 15th of February, '74? A. Right.

Q. The Ohraliks' residence is approximately about a mile from your residence in '74? A. Yes.

Q. February of '74? A. Yes. He's just about a mile or so from us, each of us.

Q. The population of Montville is less than 500 people? A. Oh, Lord, it's more than that. I would say about 3300 possibly. I don't know. I read it once somewhere, but I can't remember.

Q. Did Mr. Ohralik tell you that he was going over to see Wanda Holbert? A. He wanted to know where she lived.

Q. He didn't tell you that he was going to see Wanda? A. Yes, he did.

Q. Did he tell you he was going to interview her as a witness? A. He was going to go get her as a client.

164 He would take both of them.

Q. At the first visit or the second? A. When he come over to look at the insurance papers. I guess it was probably the second visit.

Q. That's the second visit? A. I don't know for sure. It was either the first or second, but I couldn't swear to it.

Q. Now, the insurance papers were produced for Mr. Ohralik on the second visit? A. Yeah, because I had to hunt them up.

Q. You produced them on the second visit? A. I think so, but I don't know for certain.

Q. It was after you produced your insurance papers that Mr. Ohralik told you he was going to see Wanda Holbert; is that correct? A. Yes.

• • • • •

176 ALBERT OHRALIK

Respondent herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Haffner:

Q. For the record, would you state your name?

• • • • •

177 Q. Will you tell the Panel your address? A. My home address is RFD 1, Huntsberg, Ohio.

Q. Is that in the Township of Montville, Ohio? A. Yes, it is.

Q. Which is in Geauga County? A. Yes, it is.

Q. Calling your attention now to this accident of February 2, '74, will you tell us how you first became acquainted with this particular accident? A. Fred Hoffman told me about it. He is a brother of the Postmaster and he saw me in the post office.

Q. The post office where? A. Montville, Ohio.

Q. What day? A. Oh, either the 4th or the 5th of February. It was a Monday or Tuesday.

Q. '74? A. Of 1974.

Q. And this particular accident or incident we are talking about occurred on February 2nd of '74; is that right? A. That's correct, yes.

Q. Prior to February 2nd of '74, did you have any acquaintance with Carol McClintock? A. Yes, a very great deal.

Q. Will you relate how that acquaintanceship arose? A. Yes, my brother and I frequently would go to the post office for either one of us, and we would meet other people there, and it seemed we met her more frequently than anybody else, and we would engage in conversation until the mail was distributed, and wait the distribution of mail, and while waiting we'd make conversation with each other as we would wait there.

Q. You are talking about the post office in Montville, Ohio? A. Yes.

Q. How long prior to February 2, '74, had you met Carol McClintock? A. Probably four or five years.

Q. During that time prior to February 2nd of '74, do you know how many times you met Carol McClintock

179 at the Montville Post Office? A. Yes, I would estimate 100 to 150 a year or about two or three times a week.

Q. Can you relate, if you know, what your conversations were with Carol McClintock at the post office? A. Oh, we would ask how was school, how is your boy friend, what social functions are currently going on now, things like that. Just what was new in the life of a teenager.

Q. During those conversations with Carol McClintock, did the occasion ever arise that she knew that you were an attorney? A. Oh, yes.

Q. Can you tell us how that occurred? A. Well, for one thing, I ran for political office some time, and it was certainly much easy on my campaign literature, and sometimes in the casual conversation, I would have occasion to mention that I had a court appointment some time.

Q. Now, after February 4th or 5th of '74, did anyone remind you that Carol McClintock had been involved in an accident? A. Yes. Fred Hoffman had brought it up on the 13th or he – I don't know. We made conversation on the 13th about her injury.

180 On February 13, '74, after your conversation with Fred Hoffman, did you do anything regarding Carol McClintock? A. Yes.

Q. Go ahead. A. Yes, I spoke with my brother Carol who also lives there in the neighborhood, and I told him that Carol had apparently been disabled from her acci-

dent and, "I wonder if we ought not go visit her and cheer her up."

He said, well, it would be nice, but he is committed that day and he couldn't make it.

Q. Did you visit Carol McClintock or did you do something before visiting her? A. I did something before.

Q. What did you do? A. I phoned her mother and I said that I heard Carol was banged up in an accident, and I wondered how serious it was and whether she was still confined, and she said yes, that she's in the hospital in Painesville, and so then I said, "Gee," I said, "yes, I thought we could probably cheer her up."

She says, "Isn't one of you an attorney?" I said, "Yes, both my brother and I are attorneys," but I said, "that is not why I am calling you. I just thought it would be a nice friendly thing to cheer her up," and that we are good friends.

181 Q. Now, did you proceed out to the McClintock residence? A. Not until she said – she asked me, "Are you going to go and visit her today?" and I said, "Yes, I thought I would."

She said, "Would you please stop at our house before you go," and I said okay.

Q. Did you stop at the McClintock's house? A. Yes.

Q. What date? A. February 13th.

Q. '74? A. Of 1974.

Q. Do you know approximately what time that was? A. Yes, about 10:00 or 10:30. I think it was in the morning.

Q. In the morning? A. Yes.

Q. When you arrived at the McClintock's home on that day and that time, tell us who was present. A. Mr. McClintock and Mrs. McClintock, and that's all, and I, of course.

Q. Did you have a tape recorder with you at that time? A. No, I did not.

182 Q. Tell us the conversation you had with Mr. and Mrs. McClintock on that visit at that particular time.

A. I don't remember verbatim, of course, what was said, but they were very worried that the Holberts might sue the McClintocks because the automobile that she was injured in was owned by Mr. McClintock.

They were very worried that they would be sued because Wanda had been hurt in that car.

Q. Did you do anything to allay their fears of the suit by the Holberts or Wanda Holbert? A. Yes. I explained the significance of the guest statute, and I told them they really probably had nothing to worry about on the basis of the guest statute, and I told them that most likely there was no negligence on the part of Carol anyway.

Q. How long was your visit with the McClintocks on that day? A. Oh, gosh, I would say about half an hour.

Q. Mrs. McClintock testified this morning that after you left their house, you immediately proceeded to the Holbert residence; is that true? A. That's false.

Q. Where did you go next? A. I went to the hospital.

Q. For what purpose? A. To make a social call,

183 to chat.

Q. With whom? A. With Carol McClintock.

Q. What time did you get to the hospital and what date? A. About 11:00 o'clock on the 13th of February, 1974.

Q. Did you get to see Carol McClintock?

A. Yes, I did.

Q. What room number did she have in the hospital?

A. I really don't know. It seems to me it was 2C, I think it was.

Q. Were there any ambulances visible from her window? A. No, no.

Q. Did you hear any ambulances from her window?

A. No, not in her window, but opposite the corridor on the opposite side, I did hear an ambulance.

Q. You couldn't see it? A. No, I coldn't see them.

Q. Will you relate what conversation you had with Carol McClintock on that particular date and time?

A. Oh, I told her it was certainly a mess how a drunk driver could cause her those problems.

Well, I think we first commented on the butterflies

184 that she had decorated in her room, and then I commiserated with her on how she was trussed up with pulleys and how confining it was, and then she brought up in the conversation that some hospital administrator was urging a lawyer upon her, and I chuckled and I said, "Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal."

Q. Did she mention the name of any attorney that the hospital supervisor had suggested to her?

A. If she did, I didn't catch it. I wasn't sure.

Q. How long did you spend with Carol McClintock on this particular visit? A. Oh, I guess about maybe 40 minutes to an hour, maybe.

Q. Did you have a tape recorder with you at that time? A. No, I did not.

Q. Did you reach any agreement to represent Carol McClintock at that particular visit? A. No.

Q. Did Carol McClintock and you enter into any agreement on that particular visit? A. No, not on that visit, no.

Q. I'm talking about either written or oral.

A. On the day?

185 Q. On February 13th. A. Yes, I arrived at an agreement – oh, not directly with her. Her parents told me.

Q. I asked you did you and Carol McClintock enter into any agreement on that particular date and time, either written or oral, to represent her? A. Well, orally I did through an agency of her parents.

MR. HAFFNER: Will you repeat the question to the witness?

(Question read.)

Q. Do you understand the question? A. Well, unless I am confining it to talking to her directly–

Q. I am talking about that visit at 11:00 o'clock in the morning on February 13, 1974, did you enter into any agreement either written or oral to represent Carol McClintock? A. No.

Q. When you concluded your visit with Carol McClintock, what did you do in connection regarding this matter? A. Well, she asked me to tell her parents to come up and visit her that night, so I went home and got my tape recorder and I went over to the McClintocks' home.

186 Q. On the same date? A. Yes.

Q. At what time? A. I got there about 1:00 o'clock, I guess.

Q. Who was present? A. Mr. McClintock and Mrs. McClintock.

Q. No one else? A. No one else.

Q. Where did you have the tape recorder?

A. Under my raincoat on the kitchen table.

Q. What kind of tape recorder did you have?

A. A Sony.

Q. Any model number for it? A. There is, but I don't remember what the number is.

Q. Do you have it with you? A. No.

Q. Do you have the tape recorder with you?

A. I have a different tape recorder today.

Q. Did you use tape or what kind of tape did you use? A. Cassette tape.

Q. Now, how long was your visit the second time?

A. 40 minutes about.

Q. And did you enter into any conversation with either Mr. or Mrs. McClintock during that second visit?

A. Yes.

187 Q. Do you have any recording of that particular conversation? A. Yes, I do.

Q. Is it an actual reproduction of the conversation between the McClintocks and yourself? A. Yes.

Q. Accurate? A. Yes, it is.

Q. Complete? A. Yes, it is.

Q. Do you have that cassette tape with you?

A. Yes, in here (indicating). Yes, my actual tape was here.

(Handing.)

MR. HAFFNER: Will you mark this as Respondent's Exhibit B?

(Respondent's Exhibit B was marked for identification.)

Q. Is there anything on this tape besides the conversation between you and Mr. and Mrs. McClintock?

A. The last phase of it is Wanda Holbert, but there is the continuity from the beginning to when I concluded.

Q. Part of this is the complete accurate conversation between you and the McClintocks on February 13, '74,

188 at approximately 1:00 p.m. at their house?

A. Yes, that pertains to the discussion accident, yes.

Q. Is there a possibility of deleting or erasing from this particular tape?

MR. HEISER: I object unless he is qualified as an expert on tape recordings. I object to the question.

CHAIRMAN GREEN: The question was is it possible to erase the tape?

MR. HAFFNER: Yes.

CHAIRMAN GREEN: Sustained.

Q. On the machine that you record and also play back, does it have any provisions for erasing? A. Yes.

MR. HEISER: I object.

CHAIRMAN GREEN: He has answered.

It may stand.

Q. Where have you kept this particular tape? Has it been in your possession at all times? A. Yes, my file cabinet is locked in my home.

Q. What is your knowledge of making tapes? Do you have any particular knowledge? A. Not technical. I have a functional knowledge of the operation of the machine as the manual instructs.

189 Q. Have you made any alterations in this particular cassette tape? A. No.

Q. Do you know of anyone else who had possession of this tape since February 13, 1974, to date? A. Nobody has.

Q. Now, what was the discussion on this second visit on February 13, '74, at the McClintocks' house between you and the McClintocks? A. Well, I told them that Carol wanted them to call upon Carol to discuss whether to employ me, and I mentioned that, and they said well, she has called since I left her and said I should go to work on this case, and they brought out a lot of insurance policies, and we discussed insurance policies, medical pay policies that they had, two other med. paid policies, and then there was some discussion about whether the other person had insurance or whether he was uninsured, and the fact

that he was in the hospital there, too, and there was also a discussion about Wanda again.

They were worried about whether Wanda might sue them because of the injuries sustained in this accident. I assured them that there was no basis.

Q. Did you discuss the guest statute of Ohio with McClintock on that particular date and time? A. I

190 think I did. Yes, I'm quite sure I did.

Q. Did you mention to McClintock how much could be recovered for Carol McClintock in this matter?

A. Yes, I mentioned that it had all the appearance that the other person didn't have insurance, so they would have to pursue under uninsured motorist, and the maximum possibility was $12,500.

Q. Did you tell them that they could recover $12,500 or they would recover up to $12,500? A. Up to $12,500.

Q. Was there any discussion with the McClintocks as to whether that amount was too little or too great?

A. Yes. Mrs. McClintock says, "If you could recover any money –" she must have been very dubious about any recovery – and later she mentioned if there was a recovery, whether that goes to Carol or whether she gets any of the money, and I said that it would be Carol's recovery; that it is her claim, and it would be entirely hers.

Then she says, "That doesn't seem right," or some words to that effect that, "here we take care of her and she gets all the money and we may spend money on maintenance and get nothing for it."

I said, "Is that bad? I think she's a good girl." She said, "Gosh, in this day and age, who knows?"

Q. When you left the McClintock home, in relation to this particular matter, did you go to see Wanda Holbert

191 or did you go to see Carol McClintock? A. I went to see Wanda Holbert.

Q. From the McClintocks' you went to see Wanda Holbert? A. Yes.

Q. What was your purpose in seeing Wanda Holbert? A. To interview her as a witness to the cause of the accident and the circumstances surrounding the accident.

Q. Did you go for the purpose of soliciting her as a client? A. No, absolutely not.

Q. Did you at any time solicit Carol McClintock or the McClintocks to represent Carol McClintock in this matter? A. No, I did not. Absolutely not.

Q. Now, how long after you left the McClintocks' house did you go to visit the Holberts? A. I went directly, probably five minutes later.

Q. Now, Wanda Holbert testified the last time we were here that the first thing you did when she opened the door, "I am a lawyer and I want to represent you"; is that true? A. That is false. That is categorically, positively false.

192 Q. Did you have your tape recorder with you? A. Yes.

Q. Now, I forgot which exhibit the tape is of the conversation with Wanda Holbert, but when was that tape recorder turned on? A. Well, it was quite soon. I came in and we looked for a place to sit, a convenient spot, and we tried the sofa momentarily.

Q. Did you turn it on before you sat down or after you sat down? A. I think I was just sitting down when I turned it on.

Q. Did you have any conversation with Wanda Holbert prior to turning on that tape recorder? A. No.

Q. That particular tape, which is admitted into evidence, is that the entire conversation between you and Wanda Holbert on February 13, '74? A. Yes.

Q. There is nothing additional, any additional conversation that's not recorded? A. No, other than maybe goodbye.

Q. How long a time did you spend with Wanda Holbert? A. About 20 minutes.

193 Q. Was there anyone else present at that particular time? A. Not in the proximity of us. In the adjoining room there was some children.

Q. Were they doing anything? A. Yes, they seemed to be playing and running and talking to one another, and had a TV on, I believe.

Q. Did you have any attorney-client contract when you visited Wanda Holbert? A. No.

Q. Was Mrs. Holbert present when you were discussing this with Wanda Holbert? A. No.

Q. Now, with regard to this particular matter of the accident, did you see Carol McClintock again? A. Yes, two days later.

Q. And that's February 15, '74? A. Yes.

Q. Where did you see her? A. In the hospital.

Q. The same hospital? A. Yes.

Q. The same room? A. Same room, but she had a different bed.

Q. What time did you see her, about? A. I think
194 it was the early afternoon.

Q. Did you have a discussion with Carol McClintock at that time? A. Yes.

Q. Now, what was the discussion you had with Carol McClintock at that time? A. That we would formalize our contract of employment, and I had a contract form and I brought it out. We both signed duplicates and she kept one and I kept one.

Q. That's the first time Carol McClintock signed a contract for you to represent her in this matter as an attorney? A. Yes.

Q. Did you leave any cards with her? A. Yes, I think one. I think there was one, and I said as I was leaving, "Did I give you one of my cards?" and she said, "Yes, you did." And then she looked around for it and she couldn't find it.

And I said, "Here, I will give you another one."

Q. Carol McClintock testified this morning that you gave her five or six cards; is that true? A. That is not true?

Q. Carol McClintock testified this morning that you gave her these cards to pass out to the victims brought in by the ambulance to the hospital; is that true?

195 A. No, that's not true. That is false.

Q. And at this particular date and time, was Carol McClintock ambulatory? A. No.

Q. Could you describe, if you know, her condition?

A. Yes.

MR. HEISER: I object. He is not a doctor.

CHAIRMAN GREEN: He may describe what he saw.

MR. HEISER: That wasn't the question.

A. I saw a pin through one of her legs. It was a rod through her leg, and I forget whether she was confined to the bed keeping her straight or whether it was the other leg, I forget. And then the other leg was in a set of pulleys and she was tied down.

Q. Were there any casts on those legs? A. Yes, one of the legs had a cast.

Q. From where to where did that particular cast extend? A. Gee, I'm sorry. I have forgotten, but there was a cast.

Q. How long did you spend with Carol McClintock on this second visit? A. I would say about 15 minutes.

196 Q. Now, did you go back at all to either the McClintocks' residence or the Holberts' residence after you saw Carol McClintock? A. I never went back to the Holberts' but I went back to the McClintocks' a number of times, and of course, I visited with Carol in the hospital a number of times.

Q. Do you remember when Carol McClintock was released from the hospital, the date and time?

A. No, I don't.

Q. The date? A. No, I don't know that date.

Q. Were you aware that Carol McClintock had moved into an apartment after she left the hospital? A. Yes, I went with her mother to visit her and -

Q. At the apartment? A. No, I went to the hospital to visit her, and at that time it was mentioned and it caused considerable dissension.

Q. That she was moving into an apartment?

A. Yes. I took Mrs. McClintock there, and she asked me if I was going to visit her soon, and I said yes, and she wondered if we could go up and visit her together one evening.

Q. This particular accident happened February 2,

197 1974? A. Yes.

Q. Did you ever receive any communication from Carol McClintock discharging you as her attorney?

A. I did on April the 11th – let's see – February, March, April 11, 1974, I got a letter from her.

Q. Did she ever tell you why she was discharging you as an attorney? A. No, just very abrupt. We had a very fine relationship before that. It was really abrupt.

Q. She testified this morning that she had a discussion with you regarding paying of the hospital and doctor bills, and she testified, I believe, also that her insurance company was not going to pay for that.

Do you remember a conversation like that with her?

A. I had no such conversation with her.

Q. Did she visit you at your home as she testified?

A. Yes, one day she stopped over, yes, very brief.

Q. Did you have an office in February of '74?
A. Yes, I had an office in the Standard Building.

Q. Did the cards that you gave Carol McClintock set forth your office address and your office phone number? A. Yes.

Q. Did you leave any cards with Wanda Holbert?
A. Yes, one.

198 And was that the same type of card as you left with Carol McClintock? A. Yes.

Q. Did you give Mr. and Mrs. McClintock any of your cards? A. Yes, I think I gave each one one.

Q. Did you give Mrs. Holbert any of your cards?
A. No, not Mrs. Holbert. I think I gave a card to members of the other McClintocks in the family. There is a boy.

Q. I didn't ask you that. When Carol McClintock discharged you, did she discharge you verbally or by a letter? A. She sent me a certified letter.

Q. Did you have any discussion prior to receiving that letter as to being discharged by her? A. No.

Q. Now, in your conversation with Mrs. McClintock, let's say the second visit to the house, on February 13, '74, did you have any conversation with her regarding any other attorney? A. Yes, I did.

Q. What was that conversation? A. She says, "Do you know this Brown?"

I says, "No, I don't."

199 She says, "Well, he is known far and wide."

I said, "No, I'm sorry. I don't know him. There are 4,000 lawyers listed in the Cleveland phone book," and she laughed and said, "I guess there is quite a few."

Q. Did you receive any notice of a complaint filed against you in this matter? A. Yes, with reference to Wanda Holbert; yes.

Q. When did you receive this complaint, approximately? A. Let's see. I believe about April. I don't know.

Q. 1974? A. Yes.

Q. Who did you receive it from? A. Gene Henry of the Geauga County Bar Association.

Q. What did you receive from Mr. Henry? A. A copy of an affidavit of the complaint of Wanda Holbert.

Q. Did you receive any communication along with that affidavit of Wanda Holbert? A. Along with the affidavit?

Q. Yes. A. Yes, a comment.

Q. I mean, did you receive anything; yes or no?
A. Yes.

200 Q. What did you receive? A. A statement from Mr. Henry that I may submit an answer brief.

Q. An answer brief, or an answer or letter, or what?
A. An answer.

Q. Are we talking about a legal answer or just a letter? A. A letter, I believe it was.

Q. In other words, it set forth your version of this?
A. Oh, I'm sorry. I misunderstood your question. What did I receive from Gene Henry?

Q. I said did you receive along with this affidavit any kind of communication from Mr. Henry? A. Yes.

Q. What was it? A. A letter.

Q. What did that letter state? A. It stated that there is a complaint lodged against me and that I have an opportunity to file an answer.

Q. Do you mean a legal answer or just to set forth your version of the matter? A. Set forth my version of the matter.

Q. And did you do so? A. Well, no, I filed a motion to dismiss or for a change of venue.

201 Q. In other words, you never filed an answer with Mr. Henry? A. No, I did not.

Q. Now, with regard to this particular complaint, you asked for a change of venue or to have it dismissed? A. Yes.

Q. Was there any response to this request of yours? A. Yes.

Q. What was it? A. That since I accused the committee of prejudice that the matter was referred to the Ohio State Bar Association.

Q. Did you hear subsequently from the Ohio State Bar Association? A. Yes, I did.

Q. Did you hear from any individual? A. Well, Mr. Bell's communication. Yes, I think there was a letter from Mr. Bell. I'm sorry, I am vague on that.

Q. Did anybody visit you? A. Oh, yes. Yes.

Q. From the Ohio State Bar Association? A. Yes.

Q. Who? A. Mr. Martin Hegele.

202 Q. Did you have any communication with this Mr. Martin Hegele? A. Yes, I did.

Q. What was the communication you had with Mr. Martin Hegele? A. He called on me two different times.

Q. Where? A. At 19901 Harvard Avenue. I had a property there at that time.

Q. Did he call on you both times there? A. Yes.

Q. And by any chance, did you give him a copy of the tape that you have of Wanda Holbert? A. No, I played a bit of it for him.

Q. Did you play the tape that you have of the McClintocks for him at any time? A. Yes, a part of it.

Q. Do you know whether he took any notes? A. Yes, he did.

Q. Of the tapes that were played for him? A. Yes.

Q. Did you at any time give him a copy of the tape with Wanda Holbert? A. No.

Q. Did you give him your version of what your relations were with Carol McClintock? A. Yes.

203 Q. Did you give him any information as to your relations with Wanda Holbert? A. Yes.

Q. Did he make any written notes in your presence? A. Yes.

Q. Did he give you any copies of those notes? A. No, he did not.

Q. Do you know what happened to those notes? A. No, I don't.

Q. Have you seen Mr. Martine Hegele since the visits to your place at 19901 Harvard Avenue, Cleveland? A. Yes.

Q. When was the last time you saw him? A. I thought I saw him in the corridor today.

Q. This morning? A. Yes.

Q. Now, I hand you what's been marked Relator's Exhibit 1-A through O which has been stipulated into evidence. Who did you send this to? A. I actually drove down and handed it to Mr. Bell. I am pretty sure this is the one.

Q. Where? A. Columbus, Ohio.

204 Q. What's the approximate population, if you know, of Montville, Ohio? A. Yes, I know. It's about 1200.

Q. Was that the approximate population of Montville in 1974? A. Yes.

Q. Are you still acquainted with what has been marked Exhibit 1-A through 1-O? A. I think I am. I haven't been over it for some time.

Q. I am handing you what has been marked Relator's Exhibit 7. Did you ever get a copy of that? A. Yes, I did.

Q. Handing you what's been marked Relator's Exhibit 4-A and B, is this what you had reference to as the motion for order of dismissal and change of venue that you testified to just a few minutes ago? A. Yes, it is.

Q. You don't recall when that motion was filed?
A. No, I'm sorry.

Q. Was that Exhibit 4-A and 4-B delivered to Mr. Bell? A. Yes.

Q. Personally? A. Yes.

205 Q. Do you know the approximate date of delivery?
A. No, I'm sorry, I don't.

Q. Is there any indication on there of the date?

MR. WEBSTER: There is a filing stamp by Gene Henry dated May the 20th, 1974, received.

THE WITNESS: I might volunteer that I had anticipated making an affidavit so that would orient us at the time.

Q. Did you deliver that to Mr. Henry or Mr. Bell?
A. Mr. Bell.

Q. What's the date?

MR. WEBSTER: It says May 20, 1974.

Q. May 20, 1974, states then it was received by Mr. Henry on the stamp? A. I'm sorry. If it is the motion, I delivered it to Mr. Henry.

Q. Now, handing you what has been marked Relator's Exhibit 9, which has been admitted into evidence, which is a letter from you to Mr. Henry, would you read it?
A. Yes.

Q. Have you read it? A. Yes.

Q. Now, from May 20, '74 to the date of this letter,
206 the date of May 30, 1974, did you have any communication from Mr. Henry, either oral or written? A. Yes.

Q. What was that communication? A. He said that Wanda Holbert could not get her med. paid payments paid to the hospital due to my interest in the claim.

Q. Did Mr. Henry at any time between May 20, '74 and May 30, '74, represent to you that he was the attorney for Wanda Holbert? A. Not directly, but it seemed to me he was writing and speaking on her behalf beyond that of an ethics committee member.

Q. When you were seeing Carol McClintock either the first or the second time, and especially the second time that you just related to us, did she inform you that the doctor had given her any drugs? A. No.

Q. Did you at any time after February 15, '74, receive any medical information as to Carol McClintock while she was in the hospital in Painesville? A. Yes.

Q. Would you have a chance to look at that?
A. Yes, I did.

Q. Are you familiar with what was in that particular
207 report? A. I probably was at the time. My memory is very poor on that now.

Q. Now, as to your conversation with Wanda Holbert which, of course, is on tape, do you remember any of that conversation today? A. Yes, I do.

Q. And what was your discussion with Wanda Holbert on February the 13th, 1974? A. I told her that I represent Carol McClintock and I am investigating the details of an accident, and that I am coming to her and wonder if she could shed any light and give me any information about the circumstances.

Q. Did she give you any answer as to what she knew about the accident? A. Yes, she did.

Q. What did she inform you about as to how that accident happened? A. She said she knows just about nothing, but she got a very severe blow to her head in the accident and that she sort of gave me the impression that she was momentarily unconscious.

Q. During that conversation with Wanda Hobert, did she at any time consent to being represented by you as

her attorney in that matter? A. Yes, she did.

208 Q. At the time you went and visited Wanda Holbert, were you acquainted with Wanda Holbert? A. Yes.

Q. In what way were you acquainted with Wanda Holbert? A. I had also met her at the post office.

Q. And had you seen Wanda Holbert as many times as you had seen Carol McClintock? A. No, I didn't see her nearly as much.

Q. Did you have any discussions with Wanda Holbert at the post office? A. I think so. I don't have a memory of that. I feel that I must have.

Q. But the purpose of seeing Wanda Holbert initially on February 13, '74 was to elicit information from her as a witness? A. Yes.

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Q. Did you at any time tell Mrs. Holbert that they

209 could sue the McClintocks? A. No, I did not.

Q. This is reading from Mrs. Holbert's testimony on November 24, 1975.

"Question. Was that the end of the conversation?

"Answer: No, he says that, 'Did you know you could sue McClintock?' and I said, 'I don't have any intention of suing anyone.'"

Did you make any statement to Mrs. Holbert at that particular time that she could sue the McClintocks? A. No.

Q. Also continuing:

"Question: He said, 'I saw an insurance policy that McClintock has, and you can sue them for more money than you got,' and I said, 'I don't want to sue nobody.'"

Do you remember making that particular statement to Mrs. Holbert at that particular time? A. I did not make that statement at that time or at any other time.

Q. I believe Mrs. Holbert testified that that statement

was made over the telephone to her; is that correct or incorrect? A. I did not make that statement to her over the telephone.

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211 CROSS EXAMINATION

By Mr. Patrick:

Q. Albert, let's go back to just about the time of this accident, around February 2nd. Now, I think you said that your brother was an attorney? A. Yes.

Q. Which brother is that? A. Carl.

Q. Carl? A. Yes.

Q. And you practice with him? A. No, he is rather retired.

212 Q. And you never did practice with him, did you? A. No, I don't think we ever did.

Q. Never had an office together? A. No, I don't think so.

Q. How were you operating at that time; were you operating under your house? A. No, I had an office in the Standard Building.

Q. In the Standard Building at that time. You didn't have that very long after that, did you? A. No, I didn't. I actually got probably about half my business out of my house and the other half in town.

In other words, I got a good deal of Cuyahoga County business, and about half Geauga County.

Q. Then after this accident you already testified here you talked to who, the assistant postmaster? A. He is his brother. He just simply is around there frequently.

Q. That's this Hoffman? A. That's his brother.

Q. Then from the 2nd to the 13th of February, you discussed this accident. Who did you discuss this accident with? A. Nobody. Let me point something out.

Q. No, no, no; I just want to know who you discussed the accident with in that period of time.

213 MR. HAFFNER: Object to cutting off the witness' opportunity to respond to the question.

CHAIRMAN GREEN: Overruled.

A. I discussed it with nobody.

Q. All right. Then in July of '74 you had occasion to talk to Mr. Hegele, the Bar Association investigator, did you not? A. Yes.

Q. Didn't you tell him at that time that you had a conference with your brothers as to what to do about this matter? A. No, I don't think so.

Q. You didn't say that to Mr. Hegele? A. No, I don't think so.

Q. You had a family discussion, didn't you, about what you were going to do about this case? A. No.

Q. Well, you have already testified here on direct examination that you talked to your brother about it?

A. About visiting–

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214 Q. You didn't have any conversation with your brother about going to visit Carol? A. Yes, but not with an interest in the case. I emphasized that. She's a friend and we wanted to know if we should go visit our friend in the hospital.

Q. All right. So you discussed that with your brother? A. Yes.

Q. Do you live with your brother? A. Yes.

215 Q. What's his name? A. Carl.

Q. What does he do? A. He has an occasional patent case, but generally almost nothing.

Q. This is the lawyer? A. Yes.

Q. How old is he? A. 50. I guess 51.

Q. Well, just tell me, what was the discussion about, that you were going to go visit a friend?

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A. I says to him, "Should we go visit Carol? She's been hurt, and apparently it's much worse than we thought."

Q. "Go visit Carol," you were on that friendly a basis with Carol; is that correct? A. Yes, definitely.

Q. You really want this Panel to believe that you were this close to Carol? A. Oh, yes.

MR. HAFFNER: Object to the tone.

Q. You never had any association with Mr. McClintock as far as business, did you? A. Not with McClin-

216 tock. I had no law business with them.

Q. Okay. Just tell us what contacts you had with Mr. McClintock. A. I would meet him at the post office, and I sold him an automobile, and we made a lot of small talk.

Q. It has been testified to about that automobile as to being about six or seven years before. A. I really don't know. I think it must have been about three years.

Q. A number of years before? A. Yes.

Q. And small talk. You called him by his first name?

A. Yes, I did.

Q. And Mrs. McClintock, you called her for her first name? A. I think she wanted me to, but I never did.

Q. She wanted you to? A. She said, "This is Helen," whenever she would contact me.

Q. She would contact you? A. Oh, yes; I got a lot of calls from her.

Q. No, no; I am talking about prior to this?

217 A. Oh, no.

Q. It was, if anything, a Mr. and Mrs. basis?

A. It was with me.

Q. Okay. And no phone calls? A. No, I don't think so.

Q. You don't belong to the same church? A. No.

Q. You don't belong to the same organizations?

A. No.

Q. Now, you say that they should have known you and what you were because of the fact that you ran for a political office; is that correct? A. Yes, and also a good deal of the time I had an "attorney at law" on a placard in front of my house.

Q. And so they should have known that? A. Yes.

Q. They lived a mile away? A. Yes.

Q. Did they pass there regularly? A. I don't know. I don't know where they went, but I feel sure that a small community like that–

Q. They should know you are a lawyer? A. Yes.

Q. When they said they didn't know you were a lawyer, then they would be lying?

218 A. Yes, that's correct.

Q. Now, let's go from the 2nd to the 13th; on that day you had a discussion with your brother about visiting Carol? A. What date?

Q. The 13th, is that right? A. Yes.

Q. On that day? A. Yes.

Q. Everything then began to move on the 13th of February, 1974? A. Yes.

Q. And I believe you discussed this with him in the morning? A. Yes, it would have to be; yes.

Q. Okay. So this started out in the morning, and then, what, at 10:30 or so you went up to–

A. I buzzed her. I phoned her at about, I guess about 10:30.

Q. About 10:30? A. Probably. Maybe 10:00.

Q. Albert, you had never phoned that woman before–

MR. HAFFNER: Objection to the word "Albert." The man has a name.

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219 Q. Mr. Ohralik, that is the first time you ever called the McClintock residence, is it not? A. I really don't know.

Q. You don't remember any other time? A. Unless I might have had some communication with reference to the car they bought from me.

Q. The car deal? A. Yes.

Q. But if it was anything else, it was a business arrangement on the car? A. Yes.

Q. What time did you call her? A. I imagine about 10:00.

Q. About 10:00 in the morning? A. Yes.

Q. And you were out there by 10:30? A. Yes, think so.

Q. And then I believe you also testified that same

220 morning you ended up over in Painesville at the hospital at 11:00 o'clock? A. Yes, that's right.

Q. Were you moving that fast? A. No, probably not.

Q. So how long were you there at the McClintocks' place? A. I would say about half an hour, I think.

Q. About half an hour, and then you went directly from there to the hospital; is that right? A. Yes.

Q. Well, let's get back to when you talked to the McClintocks. You were only asking about Carol; is that correct? A. Yes, that's right.

Q. And they're the ones who initiated the talk about the representation? A. Yes.

Q. So this took place in about what, 20 minutes?

A. I suppose about that, yes.

Q. So you got pretty well into the meat of the situation in a short time?

• • • • •

A. Well, they took the initiative.

221 Q. They're the ones who took the initiative?

A. Yes.

Q. After your phone call? A. Yes.

Q. And then you went and saw Carol? A. Yes.

Q. And she didn't tell you that she was under the influence of drugs, did she? A. No.

Q. You testified to that, didn't you? A. No.

Q. You didn't ask her? A. No, I didn't.

Q. And when you talked to her, you weren't talking to her then about how school had been and how she was doing away from school and her boy friends then, were you? A. I mentioned that we hadn't seen her around the post office. I did say that, and I heard about her ill fortune, and we commiserated.

Q. The small talk was over pretty quick, wasn't it? A. I don't know. I thought there was still quite a bit of small talk. I think there was quite a bit.

Q. Then you got into talking about a lawsuit? A. Well, she brought it up.

Q. She's the one who brought it up? A. She

222 said a hospital administrator had approached her interestingly enough the day of the accident and, of course, I said, "Yes, it sounds like a good case."

Q. And you said it sounded like a good case? A. Yes.

Q. And a good case that a lawyer would like to have? A. I didn't tell her that, but I said it sounded like a good case.

Q. So you went on from there, and tell us this: What got her onto talking to you about representing her? A. Because she said the hospital administrator had recommended some lawyers, and then I said, "Yes, that's a pretty good case," and then somewhere along the line she said, "Gee, I don't know what to do," and I was wondering whether she meant right there, whether it was boredom with her situation.

And I kind of asked, "What do you mean?" She said, "Whether to hire you."

Q. All right. Now, Mr. Ohralik, what was the conversation then, if any, that you had about this Brown, Mr. Brown? A. I didn't respond; I simply – she had said, she told me – and incidentally, I don't even remember the name of the firm she mentioned, if she mentioned it–

Q. Well, she did mention an attorney, did she not?

223 A. Well, I don't know about specific names. She says that this hospital administrator had recommended attorneys, and I really don't know whether she specified names.

Q. Didn't she say in here this morning that she had talked about Attorney Brown? A. Did she?

Q. I am asking you: Didn't you hear her say that? A. Yes, she did.

Q. Did she not say that at the time? A. I really don't know. I really don't know. I wasn't that oriented.

Q. Did you discuss any other attorneys? A. No.

Q. No one other than Albert Ohralik? A. Well, I didn't even do that. I just chatted with her.

Q. Didn't you tell her about some of the things you could do for her? A. No, I didn't. No, that's a complete fabrication on the part of the previous witnesses.

Q. You didn't say anything about what you could do for them? A. No. Those were new creations to me. This was a novelty to me.

224 Q. And you didn't say you knew about these things and were versed in them? A. No.

Q. That's a fabrication also? A. That's right.

Q. Now, it was two days later then that you took a contract up and had that signed; is that correct? A. Yes.

Q. And then in the meantime you were going back and you saw the McClintocks back at their house? A. When?

Q. The 13th of February. A. Yes, after I saw Carol I saw the McClintocks, right.

Q. And at that stage, did you go over the accident report with them that you had? A. I don't think so.

Q. Well, then, this is another error on Mrs. McClintock's part? A. I wouldn't say that; I just don't have a memory on that.

Q. She said here this morning that you had an accident report. A. I had none. If there was one there, she had it.

Q. You didn't have an accident report? A. No,
225 I had none.

Q. So that's another fabrication on her part?

A. Yes, I brought no accident report, I assure you.

Q. And not at the time you talked about those insurance policies? A. I brought no accident report. If there was one, they had it.

Q. You did talk about those insurance policies that day? A. Yes.

Q. I believe you said that was on the second conversation? A. Yes.

Q. While you were there to see Carol, she testified here today that you left some cards there. A. Yes. I mean, I heard her testify to that.

Q. And that was wrong also? A. That was wrong.

Q. That did not happen? A. That did not happen.

Q. All right. Now, from the second meeting then on the 13th – well, incidentally, let's go back here. Things were moving pretty fast then, weren't they?

MR. HAFFNER: Objection.

What does he mean by that?

226 Q. Well, we found out it was 11:00 o'clock that you were at the hospital, so to get to the McClintocks'

residence back from your second trip at 1:00 o'clock really pressed you, didn't it? A. I was possibly there 1:30.

Q. Well, that was pretty fast movement. How long does it take to get to Painesville hospital? A. Not long. You can certainly do it in a half hour. You can certainly do it in 15 minutes. Well, not certainly, probably do it in 15 minutes.

Q. Well, how did you do it? A. It would take me a half hour.

Q. So then you really didn't have too much time to talk to these people when you were on the road a good bit? A. Which people?

Q. Well, if you were at the hospital after 11:00 o'clock, it must have been at least 11:30 when you were there? A. Yes.

Q. And you had to talk to her a little while even to get into the meat of the thing? A. Yes. If there is an error in time, I would feel more reassured that I was at the hospital at 11:00.

Q. Well, you said you didn't get to McClintocks'
227 until about 10:30? A. Well, if there is a discrepancy – certainly, I wasn't punching a time clock. Maybe I was there a half hour sooner.

Q. You mean you might have been at McClintocks' at 10:00 o'clock? A. Could be.

Q. Well, I think she said today here that you came a couple hours after your phone call. You must have called her pretty early in the morning? A. Well, she was wrong. It was not too much time.

Q. It wasn't that much time? A. No.

Q. Then it had to be around 9:00 o'clock in the morning? A. I would think around 10:00.

Q. Let's go on then. After the second meeting there in the afternoon, you went down to Wanda's house?

A. Yes.

Q. Now, you didn't really know Wanda, did you? A. Not nearly as well, but you will recognize on the tape that she and I exchanged comments on the fact–

Q. Wanda? A. Yes.

Q. You know her as Wanda? A. No, I didn't

228 know her as Wanda.

Q. Did you know she was Holbert? A. No, I didn't know that either.

Q. You just knew a face? A. Yes.

Q. And you didn't see her very often down at the post office? A. Not nearly as much. I saw her occasionally.

Q. You went down there and walked up to the door, and I believe you testified you were there about 20 minutes, didn't you? A. Yes, about that, I guess.

Q. And that the tape that you turned over here concerning Wanda was just about all the conversation that you had? A. Yes.

* * * * *

229 Q. So then, Mr. Ohralik, you are telling us here that Exhibit 2, showing you a copy, was submitted prior to this time; is that correct? A. Yes.

Q. This is the conversation you had with Wanda Holbert on February 13, 1974? A. Yes, the cassette is; yes.

Q. And you typed it out, did you not? A. Yes, I did my best.

Q. This is essentially all the conversation you had with Wanda that day? A. Yes.

Q. There was very little more? A. Just hello and goodbye.

Q. Just the introduction? A. Yes.

Q. So then Wanda's testimony at the last hearing we had then is entirely incorrect as to what happened? A. Yes, that's a categoric lie, yes.

Q. And when you came there, you announced immediately that you were there to talk to her as a witness? A. Yes, absolutely.

Q. Now, your tape doesn't exactly say that, does it?

230 A. I don't know.

MR. HAFFNER: Object. The tape speaks for itself.

CHAIRMAN GREEN: Objection sustained.

Q. Well, let me ask you this: Mr. Ohralik, didn't you talk about her possible recovery under an uninsured motorist clause prior to talking to her about being your witness? A. No.

Q. You didn't do that? A. No, I didn't.

Q. Let me show you Exhibit 2–B, and I ask you to take a look at that. A. At some particular point or shall I read it all?

Q. Start at the top and read it halfway down.

(Witness reads document.)

* * * * *

231 A. Well, the text of it then – I incidentally said, "You have a case," but I was talking about McClintock all of that time.

Q. You were talking about McClintocks in this large paragraph here? A. Yes.

Q. When you say, "In fact, you have, too, you know." A. That's a parenthetical remark, but the entire context–

Q. Pardon me, Mr. Ohralik. You said after talking about money, $12,500–" in that policy – "In fact, you have too, you know." That's a parenthetical expression? A. It certainly is. The prior text was all about McClintocks.

Q. You followed up by saying, "Yeah, you have a claim you can for money up to $12,500. So there is a little tip I'm telling you." A. Yes.

Q. Then you went on? A. Yes.

Q. Now, in the course of that you said there was about a 20-minute conversation you had with her?
A. Yes.

Q. And this is essentially it in here? A. Yes, that's it.

232 Q. Have you read through it to refresh your recollection? A. I read your page. No, I haven't read it over.

Q. But you have read it over some time in the last year, haven't you? A. Oh, yes, a year.

Q. Do you realize that most of that exhibit has to do with representing her rather than any witness matter?

* * * * *

A. Well, I went over there to interview her as a witness, and she had nothing to tell me.

Q. You had a lot to tell her about her case, didn't you? A. Yes. Well, I mean, I made some comments.

Q. "Well, if we get $3,000, I'd get 1,000, you'd get 2,000." Did you tell her that? A. Yes, I told her that.

Q. Now, you really didn't even know this family, did you? A. No, not as a family, no.

233 Q. And when you got talking about her case, tell the Panel what other lawyers you recommended her to go see. A. I didn't recommend any.

Q. You didn't recommend any, did you? A. No.

Q. You didn't even tell her that she could go and see another lawyer? A. I told her, and I think it is implicit.

Q. You didn't tell her that there was a possibility that she could go to another lawyer? A. I think that's elementary. You can take judicial note of that.

Q. You didn't even know how to spell her name properly, did you? A. No, I goofed it up a little bit.

Q. You didn't know her father was dead?
A. No, I didn't know that.

Q. You didn't know her mother's first name?
A. No, I didn't.

Q. Then the next day you called and got ahold of her mother, didn't you? A. Yes.

Q. And that's when the trouble started? A. No.

234 Q. You never could crack the mother, could you?
A. No, but I gave her an awful lot of free advice. I think that's my problem.

Q. You gave it a good pop, didn't you? A. I gave her enough so that she could work with it herself.

Q. You got a letter a short time after that firing you on this job, didn't you, if you had been hired?
A. Some time later.

Q. I think you stated in here really the only basis of your hiring was the fact that, "So, all you'd have to do is tell me okay and I would represent you if you want," and she says, "Okay," and you say, "Okay," and she says, "Uh-huh"? A. I would say that most of my clients have essentially that much of a communication.

Q. What was your contract of representation?
A. I think most of my clients, that's the way I practice law.

Q. Now, you knew the next day from her mother that they didn't want you to represent them? A. I heard from the mother, but I didn't hear from Wanda.

Q. But it was a different situation with the McClin-
235 tocks? A. In what sense?

Q. You kept a nice relationship up with Mr. and Mrs. McClintock? A. With everybody.

Q. With everybody in that deal? A. Yes.

Q. But when you ran into the opposition with Mrs. Holbert, it was Wanda's case 100 per cent, wasn't it?
A. Everybody.

Q. Now, even up to the point when Mr. Henry got into the picture, and I believe it's your claim that he got in as an attorney; is that correct? A. Well, I don't know. He had me confused.

Q. Now, let me ask you this, Mr. Ohralik: When you got down to the point where it was a matter of you were asked to release his client as far as the insurance company was concerned– A. I was asked to, yes.

Q. –and you didn't do it, did you? A. On the med. pay I waived, and she said that she would never claim under the tort aspect of it.

Q. You were messing around with that med. pay when actually you were asked about the loss of wages claim. That's what she wanted to settle along with it at
236 that time? A. No, she said her only interest was to pay the medical bill.

Q. That wasn't the communication that you had with Mr. Henry that you were talking about in your own exhibit? A. What does it say?

Q. Didn't Mr. Henry write you that letter (indicating)?

MR. HAFFNER: Which letter are we referring to?

MR. PATRICK: May 24, 1974.

A. Yes, that's right, and that was Mr. Henry's idea, not hers.

Q. You talked a little while ago about that being a loss of med. pay instead of loss of wages?

A. Yes.

Q. Then you only agreed that whatever release you gave later then on that matter was only with respect to med. pay; is that correct? A. Yes.

Q. Now, subsequent to then you went ahead and sued Carol McClintock? A. Joined with the insurance company.

Q. Joined with the insurance company?

A. The insurance company was a defendant also.

Q. The insurance company sued her? A. No,
237 no. I joined Carol as a defendant with the insurance company as a defendant.

Q. Have you sued Wanda Holbert? A. No.

Q. You talked about a tape, Respondent's Exhibit B? A. Yes.

Q. Is this an original tape? A. Let me see. (Handing.)

If it is not, it's identical.

I don't think that was the original.

Q. Who has the original? A. I do.

Q. Why didn't you bring the original in?

A. Wait a while. I think that is the original at that.

Q. You didn't testify on direct examination that it was. Now, which is it?

* * * * *

Q. You don't know if this is the original or not?

A. No, I don't.

238 Q. You brought it in? A. Yes.

Q. Is this a common practice you have when making tapes? A. If I think I can get all the information, I make a tape. It depends on the witness or the person I am interviewing. If I think I can't take all the information down fast enough, I make a tape.

Q. When you talked to Mr. Haffner about this case, did you tape the conversation? A. No.

Q. Have you started any cases in the last couple of months? A. Yes.

Q. Have you taped conversations there? A. Yes, I think I did, yes.

Q. In every case? A. Not every case.

Q. Would you say, Mr. Ohralik, that when you taped these conversations it's where you think that you might have to show something later? A. No, it's because I can't write fast enough, and I tape.

Q. You don't like the people then to feel uncomfortable, so you put the tape under a coat? A. Yes, some-
239 times I put it out in the open. If the person is loquacious, I make it conspicuous.

Q. Now, the McClintocks are loquacious, are they not? A. No – well, yes; I think they are.

Q. But you didn't have any trouble resolving to tape them under the coat, did you? A. No.

Q. Now, are you in the habit of making copies of these tapes? A. No, I did that for this.

Q. Just for this one? A. Yes.

Q. You haven't made copies in any other cases? A. No, I never did before.

Q. You have some threats out to sue Wanda Lou Holbert in her case, have you not? A. Yes.

Q. When was the last one? A. Several months ago.

Q. Is that in writing or did you just call her? A. I sent it in writing.

Q. Would you tell this Panel whether or not you feel that Wanda Lou Holbert owes you money today?

* * * * *

240 A. Yes, I feel she does.

Q. So you feel you had an attorney-client relationship with her? A. Yes.

Q. Mr. Ohralik, in your conversation with Wanda Lou Holbert on February 13th, of which you have a taped conversation reduced to writing, you talked to her the afternoon of February 13, 1974; is that correct? A. Yes.

Q. That was the day you had been to the McClintocks', been to the hospital, been to the McClintocks' and back to her place? A. Yes.

Q. With reference to page 2-B, you told her:

"Question: And you were on your way home. It

was about 2:00 o'clock in the morning. Then this.

"I took a ride out there and I took some pictures. It's Girdled Road and Route 44, isn't it?

"Answer: Yeah.

"Question: And I kind of sized it up. It's sort of a divided highway at that point any more. . ."

You described what might have happened in the accident. Tell me and tell this Panel just how much you had done before February 13, 1974, with respect to this acci-
241 dent? A. Nothing.

Q. You did that all in that day? A. Yes.

Q. You had a very busy day then on February 13, 1974, did you not? A. I didn't think it was so busy.

Q. In addition to that, you wrote these two letters? A. Yes,

Q. I think they were both to Lightning Rod Mutual, were they not? A. Yes.

Q. And the Beedlow Agency? A. One caption will copy each.

* * * * *

Q. Those were written on February 13, 1974? A. Yes.

Q. Neither Wanda Lou Holbert nor Carol McClintock were former clients? A. No.

Q. Under any stretch of the imagination were they?
242 A. No, they were not.

Q. And neither one of them is related to you in any manner? A. Neither is related to me.

* * * * *

EXAMINATION

By Mr. Webster [Panel Member]:

Q. Mr. Ohralik, when did you take these pictures at the scene? You said you had been out at the scene?
A. Yes. On my way back from – let's see. On my way back from Carol.

Q. At the hospital? A. Yes.

Q. Now, you hadn't been engaged to represent her at that time? A. Yes, that's true.

Q. You just came by and took some pictures because you were curious? A. I have a camera in my car. I have two of them right now, and I take lots of pictures, and this was more occasion than usual to take pictures.

I take a lot of pictures even if not related to any litigation.

Q. Now, it's my understanding from your testimony that the reason you were going to go back to her folks' house, to Helen McClintock's house, was because Carol asked you to tell her folks to stop by and see her that night? A. Yes.

Q. That's the reason? That was the only reason you were going to go back there? A. Yes, it was. I would have no excuse to go otherwise.

Q. So you stopped, however, on the way from the hospital and took some pictures of the scene, not having been engaged, but just because you were interested?
A. Well, I thought it would be a good precaution.

Q. And then you stopped by her house; is that right?
A. Well, I went home first and got my recorder.

Q. To pick up your recorder? A. Yes.

Q. You wanted to have your recorder with you when you went to see her mother and dad? A. Yes. You never know what might happen.

Q. Yet your only purpose in going there was to tell them that their daughter wanted to see them? A. Yes, that's true.

Q. So you tucked the recorder under your coat just to deliver your message? A. Well, I never knew what might develop when I was over there.

Q. Did I understand you on direct examination to indicate that part of the discussion with Mr. and Mrs. McClintock is on Respondent's Exhibit B, the other tape?
A. Yes.

Q. That discussion with the McClintocks is partially on Side 1 and partially on Side 2? A. No, everything is on one side. See, I couldn't switch it while it was under the raincoat.

Q. So you didn't switch it while you were there?
A. No. I might say, incidentally, that there is a recording on both sides, but it's the same subject. One is much better than the other.

Q. Well then, I thought you said that was an original tape, Respondent's Exhibit 2? A. Well, it is.

Q. It's an original tape? A. Yes.

Q. It's the orignal of your second conversation that day with Mr. and Mrs. McClintock? A. Yes.

Q. And on Side No. 2, however, you say that is a copy? A. That I made from the original. I made several other copies, and then from some of the copies, I put it on the second side.

Q. So Side No. 1 is an original, and then you transferred that to a better tape; right? A. Yes.

Q. And from that other tape you put onto Side No. 2 of Respondent's Exhibit B? A. Yes.

Q. Now, when you left the McClintocks' house to go across the street to talk to Wanda, did you use the flip side, the other side of that tape with the McClintocks, or

did you put in a fresh tape? A. No, I was at McClintocks' first.

Q. Right. And you used a portion of Side No. 1? A. Yes.

Q. Then you left their house and went across the street to Wanda's? A. Yes.

249 Q. Now, did you then flip the tape at that time or did you put in a new tape? A. No, I continued on the same one.

Q. You continued on the same one? A. Yes.

Q. On Side No. 1? A. I think it's actually Side No. 2, I think.

Q. Oh, so it's on Side No. 2? A. I think.

Q. Well then, did you erase that when you duplicated from this other tape that you inserted in the copying mechanism? A. No, I did not.

MR. WEBSTER: May I see Respondent's Exhibit B?

(Handing.)

Q. Side No. 1 contains the original of the discussion with Mr. and Mrs. McClintock; right? A. I don't really remember now.

Q. You testified a few minutes ago first that you didn't remember, and then you testified that this was an original tape.

Side No. 2 is the original? A. Yes.

Q. Then what's on Side No. 1? A. I think the

250 same thing.

Q. It's a copy of Side No. 2? A. Well, I think it's a copy of a different tape that I made from 2.

Q. Is that a duplicate of the conversation that appears on Side No. 2? A. Yes.

Q. Just so I get this clear in my mind, you went into the McClintocks' house and you had Side No. 2 of Respondent's Exhibit B in the machine? A. Yes.

Q. I see this is a C-120, which means there is 60

minutes on each side, isn't that right? A. No, it's–

Q. 60 minutes each side? A. Yes, that's right.

Q. 120 minutes total? A. Yes.

Q. So you talked with the McClintocks, and you left there and you shut the recorder off when you left? A. Yes.

Q. Did you take this out of the machine at all when you went over to see Wanda? A. No.

Q. You just left it in? A. Yes.

251 Q. You got to Wanda's house and then you turned the machine on again? A. Yes.

Q. Did you have occasion to flip the tape from Side 2 to Side 1 while you were at Wanda's? A. No.

Q. So that you got the entire conversation with the McClintocks, and the entire conversation with Wanda, all on Side No. 2 of this exhibit? A. Yes.

Q. And at the present time that's what it contains? Side No. 2 contains the full text of both discussions? A. Yes, other than maybe hello, goodbye.

Q. And Side No. 1, does that contain the full text of both conversations? A. I think so.

Q. Now, you made the telephone call to Mr. and Mrs. McClintock because you thought that Carol would be home; is that right? A. Say that again.

Q. You called Mr. and Mrs. McClintock on that morning of the 13th because you thought that Carol was home? A. I thought she might be.

Q. And you were going to go, I believe you said, for

252 the purpose of cheering her up? A. Yes.

Q. Is this a customary practice with you cheering up people that have had accidents? A. Yes; friends, yes.

Q. Pardon? A. Yes, friends. I call them friends.

Q. You frequently do this? A. Yes.

Q. Even if you only know them casually? A. Oh, no, not too casually, but I thought I knew her well enough.

Q. Now, just to go back to the time schedule again, and I don't mean to belabor this because Mr. Patrick has been over it; but I think it all started around 10:00 o'clock when you called Mrs. McClintock; is that right? A. Yes.

Q. And then within an hour, let's say around 10:30, you got to the McClintocks' house? A. Yes.

Q. How long were you there, about 20 minutes?
A. I think something like that.

Q. So that would have been up until 10:50?
A. Yes.

Q. Then you left there and went straight to the hos-
253 pital? A. Yes.

Q. I think you said that would take you about half an hour? A. Yes.

Q. So that would have put you at the hospital at about 11:20? A. Yes. I think it would be earlier, though, but – I think it would be earlier. Apparently some of my other times are off.

Q. Let's say 11:10. So you are at the hospital; how long were you with Carol at the hospital? A. I thought 40 minutes to an hour.

Q. So you would have left the hospital around noontime then? A. Yes.

Q. And then you stopped at the scene of the accident. Is that a direct line from the hospital? A. Yes, Route 44.

Q. How long were you there taking pictures?
A. Oh, five minutes probably.

Q. And then you stopped at home? A. Yes.

Q. Did you eat? A. No.

254 Q. You picked up your tape recorder, so you probably didn't get back to McClintocks' house until about 1:00 o'clock; is that right? A. Yes, I guess that's right.

Q. And you were there for how long, the full length

of this tape or at least a portion of this tape? A. 40 minutes, I would say.

Q. Then you went across the street to talk to Wanda?
A. Wanda.

Q. Then you went back home? A. Yes.

Q. Then you wrote this letter? A. Yes.

* * * * *

Transcription of taped conversation
of Arnold McClintock, Helen McClintock
and Albert Ohralik about noon, 13 February
1974 in the McClintock home in Montville, Ohio.*

Al: I know how that is. I was talking with Carol, we we chatting and she said that I told her I was thinking of going over and having a look at the car that was damaged. She wasn't sure where it was.

Mrs.: We don't even know ourselves. The insurance company took it away Friday morning.

Al: I see. Well, she mentioned that she thought it was on Route 21 in Perry and so I thought maybe I'd go and look around there a little bit, and . . .

Mrs.: Could I take your coat, dear?

Al: No, that's alright. I'll let it sit there, it's just as well. And so, I told her that I'd like to go over and maybe take some pictures. I took some pictures of Carol in the hospital.

Mrs.: Did you?

Al: Yes, I've got a flash bulb and I took some pictures. I thought that might be kind of handy if there is any kind of argument . . .

Mrs.: Well listen, uh, where did that thing go to, Daddy?

Mr.: Well, I don't know. You're the one . . .

Mrs.: Jeepers.

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*The three individuals are identified in the transcribed conversations as follows:

"Al" – Albert Ohralik
"Mrs." – Mrs. Helen McClintock
"Mr." – Mr. Arnold McClintock

Al: Is that the policy of insurance? Yeah. I mentioned to her that I talked with you folks a little big and you pointed out, and correctly so, that she is an adult now and it's her own matter and so I says to her if she wants me to go to work, I'll go to work . . . if she wants to engage me on it, I'll be very happy and I'd start working on it . . . I'd go and probably interview that fellow – he is in the hospital, too, there, you know. The fellow that hit her . . . I'd go over there and start working for.

Mrs.: Yeah, I . . .

Al: And so I thought I'd go over there and start interviewing him and possibly go down and get some pictures of the car because I wanted to be in a position to . . . honestly state, oh yes, let's make out the accident report. Un, hunh.

Mr.: This is the one I got from the Beagle Insurance today . . . Insurance Agent, you see he signed his part up there.

Al: Un, hunh.

Mr.: Now, the highway patrol, they give us one here that un, . . .

Al: Yeah, that's right. There's at least three parts. There's a medical part back here. See now here, here's how much it would cost to repair the car. The garageman's figure. Here's the doctor's figure down here . . . on what the injuries are. Now, I think the thing to do with this is to send it in as much information as you have and then send it on . . . a statement later when you get more information supplemented. But the thing that I was really interested is in your policy of insurance. That's what I wanted to look at.

Mr.: Well, the highway patrol man, he gave us one of them papers there (two of each) to send in, there's the one you send in to get the, the $3, to get the, um, to get the report, to get the complete report, including pictures. He said he took the pictures over there and we will get the pictures too, so I imagine probably maybe with both cars.

Al: They'll have a good report. I've gotten those a lot of times. I tell them we need a good report. You send the $3 like you did, they'll come through very nicely. Now you see, this here is, I'm quite sure is a renewal of the policy.

Mrs.: This is the first and this is the second down here.

Mr.: The truck, that's number one and the car is number two.

Al: But I feel there must be a policy of several pages with a lot of writing on it, unh,

Mrs.: No, that's the policy . . .

Al: There would have to be another one. You see this is an endorsement. See, this is . . .

Mr.: The original policy down here . . .

Al: See now, that unh. Let's see what we have here. We have bodily injury . . .

Mr.: This is a continuance of, you know . . .

Mrs.: Continuance . . .

Al: Yes, that's right. This is a renewal on it.

Mrs.: (unintelligible)

Al: Well, a thousand each person. Well now, that's a nice help, that's a great help. Now, let's see . . .

age, age, there's a $25,000, each is $25,000. $12,000 . . . $25,000 on the liability, that's in case you hit

somebody else. Now let me see, uninsured motorists, good that you have that, good, very good, very good.

Mrs.: Are you reading the second one down there?

Al: Yes, yes, right here, Uninsured Motorists and unh, now, it doesn't say on here how much the coverage is on the Uninsured Motorists but I'm sure the original policy would have that, uhn, could you take a look. Here it is, $12,500, $12,500 each person and $25,000 each accident. Now, the girl next door . . . it's over here, isn't it? Oh, I see. Is it on the same side of the road?

Mr.: Across the road.

Mrs.: Third house up on the north.

Al: Oh, and on the other side, I see. Now, unh, her brother, I guess it was, was over there and he said . . .

Mr.: Brother-in-law. Her sister . . .

Mrs.: Brother-in-law . . .

Al: Oh, that's right, these people are Holbrook, no, no, the Holbrooks are, is the

Mrs.: Girl

Al: That's right, the that's her maiden name and

Mrs.: Holbert, H-o-l-b-e-r-t

Al: Oh, did I have that wrong?

Mrs.: Yes.

Mrs.: Mrs. Holbert, mother's name is Marie and her father's (unintelligible)

Al: That's right.

Mrs.: You know her father's dead.

Al: Oh, I see. Now, their maiden name, of course, is not Holbert, its the . . .

Mr. & Mrs.: (unintelligible)

Ms.: It's Fike.

Mr.: Was in there was down there, Theresa. That was the sister, and unh, mother-in-law down there

Mrs.: His name was Gary.

Al: That's right, Gary and Theresa Holbert.

Mrs.: Fike.

Al: Fike, that's right. Holbert, I guess, yes, I see.

Mrs.: Fike, spelled F-i-k-e.

Al: And then there's Marie and Wanda Holbert. Now, here's one thing about an accident like this, about a claim like this that I think will ease your mind an awful lot. Now, the law says that when unh, you see in the old days before they had very many cars, people used to ride together a lot, and if somebody rode with a person and they had an accident, the person who was riding, they would kind of get together and they would say that I would sue you, and they would kind of get together and, and then they could sue one another and they would collect and then the insurance companies got smart and they went down to the legislature in Columbus and they had to pass laws. And the law they had passed was called the "Guest Statute." And, that means this, I a guest is someone who is driving in the car with the driver, the guest cannot sue the driver for any accident unless . . . and this is . . .

Mrs.: He is a paying guest.

Al: Yes, so that's the law, Yes, that's one condition,

there is another one condition. That is if he was a real wild, wild driver and the person who was riding protests and says "ease up" Say, please ease up, please give me a break, take it easy, please let me out." Now, if that happens, then the person could sue.

Mr.: Yes, you know because (unintelligible) unh, unh, driving that Electra, you see . . .

Al: That's right. Recklessly. Wantonly and wilfully recklessly. You see, now in that situation, that eases the problem, you don't have to worry about having the other party suing. Well, in that situation, you don't worry. Anybody can sue anybody else but whether you can win or not, is another matter, you see. So that makes it fairly safe. I think the best course of course is to talk with Wanda. I think it would be interesting to talk with her and get her version and kind of get her on, as though she . . . and calm her down and get her to thinking towards the other side, you see and also on the uninsured motorist.

Mrs.: Well, when we were down to the hospital one day, she was with me and we asked Carol what she thought of the situation, about the guy, you know, she said "Mom, I wish he'd die." I said no, I said no dear, you're wrong. I said let him live and be punished in another way . . . I said if he died that would be the end of it.

Al: That's true. He wouldn't have any problem any more.

Mrs.: Right, I said, that would be the end of it. But, I, just like this other insurance pointed out to her,

he said you can sue him, said the agent, he said you can sue him.

Al: Sure,

Mrs.: And, unh, we do that it can be done.

Al: Sure,

Mrs.: It can be (unintelligible) both of them can be can sue him.

Al: That's right.

Mrs.: And, but Wanda swore up and down she would not do it. And, we (unintelligible) they release her today.

Al: Yes, I noticed. I checked at the hospital and they said she wasn't in.

Mrs.: Now if that didn't rattle me for what I couldn't get over it.

Mrs.: Yesterday she couldn't walk and today they released her.

Al: Jesus

Mrs.: Tonight she's going to school.

Al: On my gosh, well . . . it's at night, she goes to college, or what?

Mrs.: No, she's going to night school.

Mr.: No, the high school down there has got night courses. Carol was taking a course down there, but Carol finished up hers in the middle of January.

Al: Oh, I see.

Mrs.: In the middle of January.

Al: Oh, that was nice, um, hunh.

Mr.: Wanda, she says she is still going to go there, I guess until May or . . .

Al: Now, here's a situation on these uninsured motorists problems, I had to contend with these quite a few times myself. Now, a person comes along, now, starting off, Carol has a perfect lawsuit against the other fellow. Now, if he doesn't have insurance and he doesn't have a home now, that's when your uninsured motorist comes into play, you see. If the other fellow doesn't have anything, now what she does, Carol goes against your own insurance company, Lightning Rod Mutual Insurance Company and she asserts a claim. And then we have to show the Insurance Company that there was no insurance on this other guy.

Mr.: (unintelligible)

Al: Yes, on Bennett. Now what we do is approach him and say do you have insurance and he says no, sorry. Let's make an affidavit and when we put it in the affidavit I would say, I, Charles Bennett of such and such an address, being first duly sworn according to law, depose and state that I own such and such an automobile, that I, on the 2nd of February, 1974, this automobile had no liability insurance on it, especially on the occasion when it collided with the automobile driven by Carol McClintock and he signs that, then we submit that to your insurance company and then we start talking with them about how much money they should pay, and . . .

Mrs.: In other words, you talk to the insurance on this liability and the settlement?

Al: That's right. See if you can settle it. Then you talk to them and show them why you say, here this young lady has a terrible scar, she's a charming young lady and it means an awful lot to a

young lady. She has broken legs, she has had pain and suffering. She has limited movement, she's been confined from the job, she has lost pay . . . well, she didn't lose pay, she was laid off from her job, I think she said . . .

Mrs.: Yes, she was temporarily laid off.

Al: Um, hunh.

Mrs.: She wasn't laid off indefinitely.

Mrs. and Judy, the girl she's been working with, she's just 2 or 3 days.

Mrs.: Yeah, she's only been off (unintelligible)

Al: Yes, so then what you is you present that to the insurance company, you say now, look, here is a policy of $12,500, and now, pay us off and the company might say yes, we owe you money, we'll give you $4,000. You say, $4,000, balogna, you give us $12,500, because this is certainly the maximum, and then if the company doesn't pay it, then you sue them.

Mrs.: Um, Hum. . .

Al: See, that's the way it's done. You simply say you pay up what we have coming.

Mrs.: Well, what if that don't give you the unm, won't sign the affidavit. . .

Al: Well, then the way you do it then is you sue him. And then when you sue him you you will find out that no insurance comes in to defend him, see, that's why you have an insurance company. If no insurance company comes in to defend, then you can take that case and you can dismiss it. But, you get an entry from the court showing that that fellow, that the insurance, that the lawyer or no lawyer, that, that lawyer was not hired by the insurance company and then that's good enough, then you can get rid of that case and you can go from there. But, the sad part of the whole thing is that I think that Carol's injuries are worth more than $12,500, that's the thing that's so tragic about it.

Mrs.: Well, that's what we keep saying . . .

Mr.: Well, . . . that's what I say . . .

Mrs.: She's got to go under a lot of suffering . . .

Mr.: How do you go into setting a price on (unintelligible.) She broke both legs, it's all she's got, and walk, we don't know what's she going to have complications afterwards, and so, (unintelligible) even $25,000 even maybe is, maybe is a small amount

Al: That's right, that's right, it's very sad.

Mrs.: (unintelligible) her life and . . . (unintelligible) all of her time, and.

Al: Sure is . . .

Mr.: She's never going to be what you say normal 'cause anytime you've had a broken bone, why, it could take, a lot of times the weather, it can pain you afterwards a lot. Now, I got an uncle there, that back in the 30's, he was working at Euclid Crane and they was driving in the parking lot and they had the "i" Beam (unintelligible) the "I" Beam so they was keeping it, uh, around, unintelligible, it jumped up and hit and threw him up and the "I" Beam come on his arm and broke his arm and shattered it up and, uh, the company, they give him, of course, an bargain afterwards, but that arm is still (phone rings) crooked and he couldn't work construction, he couldn't work in structural steel

work anymore on account of he that arm wasn't as strong as it used to be

Al: Right.

(Mrs.) Talks on the phone.

Al: To Mr. McClintock's statement, "I see."

Mr.: See, some of the times he could be, uh, cutting a person's hair and then, unintelligible, in his left hand and, um, and have the comb in his hand and he would drop and he would never know that he had dropped it out of his hand.

Al: Now, I see. Well, so now, unintelligible. I would like to take a few notes on this. This is Lighting Rod Mutual. Now, see that's the part that's sad about it 'cause when you go against your company all you can go for is the amount of this $12,500, see, that's bad. (Directs conversation to Mrs. What I was just mentioning to Mr. McClintock, Mrs. McClintock, the thing that is sad is that the most you can go is for $12,500. Because that's all the policy is. But, um, now, did the other guy have or we don't know what he has and, um, it's probably nothing, so you have that problem. Um, what to do. I, I, un, it seems to me. Well, what we should do, I think, is this is to conduct an investigation of this fellow and, there's a lot of ways you can do it. You can go over and talk to neighbors, you can look at work records, you can look at city directories and see if he is working, see if he owns property check the records in the Recorder's office to see if he owns property and all that and then you can check up on whether, on what his financial worth is, and, um, Then you can determine how much in assets he has, But, uh, fortunately, on

these things, you don't have to act real fast. Now, the law says you have within two years to sue in a case like this. From the time I, that the accident happened. But, that is true of the person who caused the accident. You have two years, now, on a matter of an insurance policy, that doesn't follow, they can change the period of time in which to sue an insurance policy cause it's a contract. A policy of insurance is a contract. And a contract will set forth how soon you have to file suit, but I do feel almost positive that it's certainly a year. I feel that you have at least a year. So, the thing is that you don't have to do anything real fast, you see, there's no great rush, rush, about the whole thing. And, um, if you can look into it and check it out. Check out the . . . now what I would like to have you do is look some more and find the original policy.

Mrs.: I'll see if I can find it, in the safe, but I want to ask you some questions. On this um, girl who was in the hospital, say, supposing on that $12,500, supposing that um, she lives and comes out of it o.k. and now she has left the hospital, are we in any way responsible on this insurance for her?

Al: No, she, I, I, can see no basis for which she can contend. First of all, her claim is against Carol if she if she has a claim, if she a claim, not you.

Mrs.: Yeah, un, hunh.

Al: Not you, because Carol is the one who was in the car when it happened. There is a kind of far-fetched theory which says that maybe you folks were careless in turning a car over to Carol because Carol was not a good driver. now that . . .

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Mr.: Oh no. Now, I paid $85 for her to take the course at Suburban Driving School.

Al: Oh, I'm sure that she is good. It's just that I'm saying what other people might say.

Mr.: Yes, unintelligible, they claim after taking a driving course like that even the insurance companies give you a better (lower) rate on policies.

Al: Yes, the real answer to you, Mrs. McClintock, is really this, you ask if anyone can sue you. Anybody can sue anybody else.

Mr.: Oh, yeah, that's what I always say, there is no justice to law.

Al: Well, it's not only that. But they can file a case. But there are some they are sure to lose, some are sure to lose. I thought I heard a knocking outside.

Mrs.: (unintelligible) I'll go look. I baked some Brownies. (unintelligible) She forgot to bring some home from the hospital. She said I want them so badly, they were so good. (unintelligible)

Al: But, um, But strictly on that question of whether they can sue. Sure, they can file a law suit, but they're not going to win one like that because when Carol was handling the car, and especially if Carol had her driver's license, and the car was legitimate, it was not a stolen car or something like that. I can see no basis for that they can bring an action against you. I can see no basis for it at all. There is no question, she is entitled to $1,000 on the medical – the other girl is, and she, of course, can bring her own $12,500 claim against the Insurance Co., but to come against you individually. I can see no basis for that, I can see no basis for that.

Mrs.: Well, put it like this, supposing they had to pay out of Carol's up to $25,000.

Al: Well, that is for 2 or more people. $12,000 is the most for any one person. And $25,000 is for any combination, 2, 3, 5.

Mrs.: Ok, well it would be $12,500 apiece.

Al: Yes.

Mrs.: Alright well will that affect our insurance do you think?

Al: No I don't think so, No I don't think it will affect it.

Mrs.: Because we weren't at fault in any way.

Al: No, heavens no. I'm sure of that. I took some pictures by the way of the scene. It was Girdled Road – that's were it happened.

Mrs.: Yes

Al: And I've got some pictures of that. It's a nice wide road – there is no excuse for him doing what he did and far as Carol is concerned I can't see how she did anything wrong.

Mr.: Now my 2 boys went down there and they were talking to one of the guys at the gas station who towed it away and he said that she was definitely clear over off the pavement on the black top.

Al: I see.

Mr.: On the edge there.

Al: On the west edge.

Mr.: Ya, so he comes across the centerline and across and she was clear over there on the black top and there on the edge well he was more than at fault.

Al: Way more than at fault – that's right. Now she must have seen him coming that's why she moved.

Mrs.: She said that she got as far over as she could get and she said it just happed so quick Momie she said I didn't

Al: Yall

Mr.: The highway patrol man showed us a picture just like this road here the centerline here –

Al: Uh huh.

Mr.: He had her car settin like this.

Al: Uh huh.

Mr.: And the guy who towed the car away he said it was on the blacktop more than on the edge of the road. Of course, the highway patrolman said when he got there it was snowing and storming then and people where around then – he said you couldn't see no skid marks or anything because everything was all covered up.

Al: Uh huh.

Mr.: But he said that this Bennett come across the center-line and hit her head on.

Al: Sure looks that way.

Mr.: But she was hit the hardest on this left corner.

Al: She was trying to angle away.

Mr.: Up there the bumper was hit right into the tire and cut the tire halfway in two.

Al: Oh no.

Mrs.: Do you want me to look for that thing?

Al: Yes that would be handy if you could find it, Mrs. McClintock. Let's see let me jot down here this

policy. O yes, you must have bought the policy back in 1964 and then you got renewals after that.

Mr.: Ya, well it was sometime time ago then we put this other car on why then we changed the

Mrs.: Daddy get out the . . . look at both of them – here's the key that good for both of them – I'll look in the vault – if you find it holler.

Al: Fire places are nice, aren't they?

Mr.: Yal

Al: Where is Joseph Beedlow Agency, Mr. McClintock?

Mr.: Rock Creek.

Al: Oh I see. Of course you are entitled to have your

Mr.: Here is his address right up here.

Al: Oh yes I see Uh huh Box 52. Uh huh Ok.

Mrs.: Where did my . . . go?

Al: Well if you remember that and he was the adjuster, you said.

Mrs.: Yal I got that right here – I know that much.

Al: OK.

Mrs.: Let's see – that it a William C. Hengelbrook (unintelligible)

Al: Yes I see – OK

Mrs.: Here is these other informations you might possibly need

Al: Alright uh huh

Mrs.: I'll just have to think where on earth I could put them keys – I haven't had occasion to use that paper so long.

Al: Uh huh.

Mrs.: My God I'm even cleaning house again.

Al: Uh.

Mrs.: Might be right here in the desk.

Al: I don't know

Mrs.: You can't find anything with a policy in it.

Mrs.: (Not discernible)

Al: Mrs. McClintock, Carol had asked me to ask you folks to visit her tonight to talk with her, but Mr. McClintock thinks that she phoned you folks since then.

Mrs.: Yes she did.

Al: I see

Mrs.: She said tell you to go ahead with it.

Al: All right, fine. I'll certainly do that. I'll – you've got to find out then – alright – now the adjuster knows

Mrs.: Did you check through this one.

Mr.: Ya, but there ain't nothin in there.

Al: OK maybe I'll take a run right back up there. Not let me see. This adjuster would probably know where the car is – he's the one who told you where the car is.

Mr.: Ya – he's the one who said I have to send

Mrs.: That guy there Holbrook of whatever his name is – he's the one that come here and took care of the claim from Ashtabula. He's the one who went to the hospital to see my daughter.

Al: I see. Great OK

Mrs.: I don't know if he knows where the car is now.

Mr.: He's the one I had to send that there title to. He's the one that told me that they would pick the car up.

Al: Uh huh.

Mr.: So he should know where the car went. Because he's the one that give some order to remove it.

Al: Yes I would think so – uh huh – OK. I'll go up and get some pictures of it.

Mrs.: muffled.

Al: Well I'll tell you what Mr. McClintock, I'll write to the company and ask them that question. Don't bother looking anymore. I'll go right directly . . .

Mrs.: (Unintelligible) I know I must have put it someplace safe – but where?

Al: These drunk drivers they're really in a mess. I'll make these forms out Mrs. McClintock – I'll take these and I'll prepare them. We won't rely on that investigator.

Mrs.: Now the I don't know why this other guy said he told me he was going to phone me at 9:30 the supervisor at the hospital.

Al: I see.

Mrs.: He never called and I was right here all morning. That was last Saturday – he never called me.

Al: Ya – he probably has no intention to too.

Mrs.: I know he was upstairs and he said he wanted to see me downstairs and when I got downstairs and went to the credit desk – when I got down there – they said he wasn't there and he never got no message.

Al: I see.

Mrs.: And I went out in the hallway and low and behold if he didn't meet me out there. And that's when he told me them people didn't have a cent of nothing.

Al: I see.

Mrs.: And so they are just a young couple starting out and they didn't have a thing to their name.

Al: That's so often true. Ya and it's so tragic. Does Carol have a middle name?

Mrs.: Lynn L Y double N.

Al: OK

Mrs.: She's born January 13, 1956, anyway she's 18. (unintelligible)

Al: Uh huh 1956 – yal she's an adult – it's hard to believe, isn't it?

Mrs.: Yal.

Al: Gee I'm so saddened about this because she's such a pretty young lady.

Mrs.: Here is here graduation picture.

Al: Yes, I noticed, she's a very, very lovely.

Mrs.: Our twins are the two on each end and the one in the middle Beth and the short stop.

Al: Gee I didn't know there were that many in the family.

Mrs.: I have eight children.

Al: Wow – oh my God.

Mrs.: Now this claim – if you can get anything on it – will that all go to Carol or would that be divided up?

A': You mean uh.

Mrs.: Of the insurance

Al: Well, of course, for representing her I would get a third.

Mrs.: Yes, well I mean would she get the rest then.

Al: Yes she would get all the rest.

Mrs.: She could say well that's mine and we take care of her and everything and it don't make no difference Huh?

Al: Yes that's right. Is that bad? I mean do you are you hurt.

Mrs.: I mean I think if I have to take care of her for a month I mean 3 months or 6 months I should come into something. I mean I got to be worth something wouldn't you think.

Al: I certainly do – its not – I'm not saying that's its right you know Mrs. McClintock, I'm just pointing out that she is an adult and she asserts her own claim.

Mrs.: Yes that's right.

Al: Yes I agree its not right. But I think she's a good girl – she'll probably come through wouldn't she?

Mrs.: Your guess is as good as mine. This day you don't know what they're going to do.

Al: Uh huh, sure.

Mrs.: Well if you want to go up there and talk to the girl – she's home.

Al: Now I think you said its the third one up?

Mrs.: There are two colored people, its the third one up. Its a porch all the way around.

Al: Yes OK.

Mrs.: I don't know – you can tell them you're representing Carol. You can do whatever you want to do.

Al: Well OK I uh understand uh huh. I think the easiest thing for me to say to her is just very frankly that I am investigating the claim because I do represent her, and I have an interest in finding out her version of what happened, any observation that she might have made, any statements she might have made – I think it would be very fitting thing to ask her.

Mrs.: Yal

Al: Um hum sure.

Mrs.: Now – those cards there –

Al: Yes I'm going to give those all back to you, Mrs. McClintock. I've got my original papers and I'll take your accident reports or if you want those I'll leave them if you like – I'll take them though because I can start making them out a.

Mrs.: Do you need anything more over here?

Al: No I think not – I think I have it all.

Mrs.: You have the envelope and everything you need?

Al: Yes I think I have it over here. Yes. I'll give you back everything that's yours. Now.

Mrs.: They are very I mean different you can tell them what you like. Because this you know what to say being a Lawyer you're kind of used to this a.

Al: Yes that's true.

Mrs.: You have to be a little bit careful with them because they do do enough talkin

Al: I see uh huh, I see.

Mrs.: And a

Al: Ok and I'll be forewarned – I appreciate your letting me know.

Mrs.: Well – this is the only thing I can find – that a

Al: But that on the home now isn't it?

Mrs.: Uh hum.

Al: Yes.

Mrs.: We've got one besides

Al: Yes

Mrs.: Liability is only $5,000.00.

Al: Yes that's in case you hit somebody else.

Mrs.: Uh well this is on the home.

Al: Oh yes that's right – that's right on the home that's right. Well okay let's tell Mr. McClintock to stop and I'll see if I can get the information directly from the company and a.

Mrs.: Well in the meantime if I find anything I'll . . .

Al: Yes that would be good uh huh sure because I'd rather the company didn't know we can't locate it – I'd rather they didn't know that they might just all of a sudden come up with the brilliant idea that the policy doesn't exist. Of course, we obviously have the endorsement here and you have, your probably a cancelled check that you paid the premium on.

Mrs.: O yes indeed. Oh you mean the last one? I'm sure we have it right now.

Al: I know that's what the bill was – that's quite a bit. tock.

Mrs.: I just paid a hundred and twenty-seven dollars.

Al: I know that's what the bill was – that's quite a bit.

Mrs.: Isn't it?

Al: Ya it's a lot of . . .

Mrs.: I think that some days you ought to get something back. Here's another thing you being a lawyer and since you are already here I'm going to ask you another question.

Al: Sure go ahead.

Mrs.: We have had the insurance with those guys for years and years.. And we figured as long as we have the insurance policy with them that we . . . our boy and he could go on to it. Well what happens is that he was overseas in Japan and we had never had a claim with them except for the fire on my house in Thompson where it was over 15 years ago.

Al: Uh huh.

Mrs.: Well we had the oldest boy insured and when he came back in 1967 – but in the meantime – they cancelled him out of that insurance – he was not even in the United States.

Al: Now that was what – about three years ago wasn't it?

Mrs.: 1967.

Al: Oh it was five – six years ago.

Mrs.: Six years ago.

Al: Yal See that has been a sore point with a lot of people – in fact I personally had to contend with that problem Mrs. McClintock – I had a cancell out too. And some of those companies went on the idiotic rampage a long time ago just cancelling people out left and right.

Mrs.: Now we was also with Nationwide. And I wouldn't have them as no insurance for love nor money.

Al: No that's right – we've had problems with them too.

Mrs.: Lightning Rod Mutual.

Al: Hey now that might be it. Let's see number 28595?

Mrs.: Ya but . . .

Al: Well let's see that's the one but it's still only an endorsement – it's not the whole policy.

Mrs.: Well I don't ever remember getting anything.

Al: Well it was – it must have been way back quite a while – see it says it began in 1964 – see that's ten years ago. See the policy began way back and ever since then you've just been getting these endorsements you see. See what they do is.

Mrs.: That's a 65 chevy.

Al: Ya.

Mrs.: 72

Al: Uh hun yes well see what happens is you keep renewing it – that's right 72 this was a six month period here also I think and what you do is you bought an original policy and every 6th month you renew it you see – you pay the premium and that extends it.

Mrs.: I know that its around here.

Al: Oh I'm sure you have it – I'm sure you have it.

Mrs.: It's just a matter of finding it.

Al: That's all right ok.

Mrs.: If I'd known how much you were looking for it, I'd would have had it.

Al: Oh that's alright that's okay we'll take it from here. Its just that we want to be sure that we don't –

you see a lot of times when you are discussing a case sometimes its good not to hurry because uh sometimes the case develops a little bit. . . better you get more information as you wait. So what a lawyer does is he doesn't want to file a lawsuit too soon and so he takes his time. And he takes his time to evaluate the case and as more time goes by he can have a better opportunity to evaluate.

Mrs.: Now this insurance that I'm talking about uh Lightning Rod Mutual – they won't let neither one of our boys drive on it because one boy here the youngest one he's had two accidents and they've had to pay for them. One of them was his fault due to a storm.

Al: Uh huh. I see.

Mrs.: And it was foggy and he hit across a thing and another one he hit up her on a – no – I think we paid for that – or he did – where he hit the abuttment hole.

Al: Where was it up there 86?

Mrs.: No its up there at Chardon some place. My husband knows where it is. Anyway we took care of that one I believe and the next one the girl grabbed the wheel and they hit a car or a tree and tore up some shrubbery in the yard there and he demolished our new compact car we had a little vw and so.

Al: I'm going to give you one of my cards too so that if you have to contact me of course, I'm in the book but I have a Cleveland number too, see I'm in an office in the Standard Building in Cleveland.

Mrs.: Oh

Al: Uh huh.

Mrs.: Did you know either of those guys that I just told you about?

Al: No I didn't Mrs., no I didn't.

Mrs.: Well that Brown, he's known far and wide down there, I was surprised – I thought you knew him.

Al: No I didn't – well there are 4,000 lawyers in Cleveland.

Mrs.: Oh ha ha ha, no wonder you didn't know him.

Al: Yal there are 4,000 listed in the phone book. Well shall we tell Mr. McClintock that – let it go for the present?

Mrs.: Well he'll be just like me and keep right on looking.

Al: OK well alright.

Transcription of taped conversation
of ALBERT OHRALIK and WANDA LOU
HOLBERT on 13 February 1974*

Transcription of taped
conversation of ALBERT OHRALIK and
WANDA LOU HOLBERT on 13 February 1974*

A.O. We . . . ah they asked me to go and talk with Carol. They said that this drunk didn't have any insurance. No! Well it's not that bad, see . . . Of course they've hired me as their lawyer. I'm Carol's lawyer now.

W.H. Unh huh.

A.O. And we've checked the insurance policy. I've looked at the insurance policy and we find that there is what we call Uninsured Motorist that means this, . . . let me explain. Its kind of complicated. You see, when a person has a car and wants to be safe and make sure that no one sues him if he has an accident he buys a policy of insurance. All right? Now you can have a lot of coverages in insurance. You can say if I hit another person I hurt him my insurance co. will pay. Then they have a policy that says we damage my own car. If we damage my own car we'll pay – my own insurance company will reimburse me for the car's damage less maybe $100.00 deductible. Or something like that. Then we have a collision coverage like maybe an

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*The two individuals are identified in the transcribed conversations as follows:

"A.O." – Albert Ohralik
"W.H." – Wanda Lou Holbert

object falls off a building and ruins a car we cover that. You see, that is collision (sic) coverage.

W.H. Uh Huh

A.O. Then there is a policy that is kind of new. Its about 4–5 years old. And they call it uninsured Motorist. That is what they call it. Now when someone buys a policy like McCLINTOCKS bought a policy that says Uninsured Motorist Coverage. Now if the person who hurts them doesn't have insurance they can go against their own company. And this – They can go against their own company for up to $12,500.00, so we have a good claim, see, for up to $12,500.00, . . . in fact you have too, you know.

W.H. I do?

A.O. Ya, you have a claim you can for money up to $12,500. So there is a little tip I'm telling you.

And . . . so, how old are you Wanda?

W.H. 18

A.O. Oh, you are? Ha Ha, well your an adult now. Very good. So now lets see, about this accident, what happened? You had been to a dance, I guess.

W.H. Yal

A.O. Unh Huh. And you were on your way home. It was about 2 o'clock in the morning. Then this . . . I took a ride out there, and I took some pictures. Its Girdled Road and Route 44, isn't it?

W.H. Ya

A.O. And I kind of sized it up. Its sort of . . . its not a divided highway at that point anymore, so as Carol was approaching Girdled Road, I think, this fellow came across the road, didn't he?

W.H. You know, I don't know because I hit my head on the dash and . . .

A.O. Unh Huh

W.H. I didn't even know who my own brother was.

A.O. Wow.

W.H. And I didn't even know where I was for 2 days.

A.O. I can believe it.

W.H. And the last thing I remember is leaving.

A.O. I see. So actually you know less than Carol does.

W.H. Yea. HA HA.

A.O. Are you going to file a claim on this, or . . .

W.H. I, ha, ha, ha, really don't know what's going on.

A.O. Well, I could easily represent you as her if you want. I would be very happy to. What I do is, see it doesn't cost you anything. Just . . . anything we recover I get a third of it, see?

W.H. Unh Huh

A.O. If we get $3,000, I'd get one thousand, you'd get 2 thousand. And I could represent you just as well as them. See, its the same kind of case – it's the same case. So, all you'd have to do is tell me it is O.K., and I would, I would represent you, if you want.

W.H. O.K.

A.O. O.K.?

W.H. Unh Huh!

A.O. And, let's see, we ought to get some information, Wanda, you address is what?

W.H. My last name is spelled H O L B E R T

A.O. Oh I'm sorry H O A L B E R T. Do you have a middle name, Wanda?

W.H. Wanda Lou

A.O. Lou, unh huh Lou, o.k. You're 18 years old. That's good. You're now an adult

W.H. Unh huh

A.O. Your injuries are pelvis broken, ribs . . .

W.H. Cracked ribs

A.O. Left side, is it?

A.H. Yal

A.O. I see. Where is Dad and Mom?

W.H. My father is dead. My mom went to the hospital. (unintelligible).

A.O. Oh my gosh, that's another matter, isn't it? You know, you and I used to chat with one another at the Post Office, didn't we?

W.H. Yep (chuckle)

A.O. Ya, you're very pretty, by gosh. We have an awful lot of pretty, young ladies here in Montville, By Golly. You have to excuse that. I've never been married. That's why I notice beautiful young ladies, you see, unh huh, O.K. W A N D A L O U H O L B E R T. And of course you just recently got out of school, didn't you?

W.H. Right. I attend night school

A.O. I see. Alright . . .

W.H. And I work during the day

A.O. Oh yes, were you employed at the time of the accident?

W.H. Yes

A.O. Where?

W.H. Heatherhill Nursing Home

A.O. Oh, I see. That's in Kirtland, isn't it?

W.H. It's in Charden on Bass Lake Road.

A.O. Oh yes, yes, yes they used to call it Eldercare

W.H. Yes

A.O. Yes I had a cleint over there too (Wanda chuckles). A black lady was one of my clients over there.

W.H. Unh huh

A.O. 2 years ago. It's a nice place, isn't it?

W.H. Yea

A.O. Yes

W.H. We'll miss it.

A.O. I can imagine. Yes. Well you see you can also claim for loss of earnings, you see, so how much did they pay you there?

W.H. $1.85

A.O. Unh huh. And how many hours a week?

W.H. I worked 30 hours a week.

A.O. Unh huh. so O.K. so now you won't be able to go to work for quite a while?

W.H. Unh huh, ya'll. No (chuckle)

A.O. Who paid the bills up there? I guess it was on Mr. McClintock's policy, the medical pay bill up there. How much was the bill, do you know, up there at the hospital?

W.H. They gave my mom this, see look.

A.O. Oh

W.H. That shows she even signed it without me even seeing it.

A.O. I see

W.H. And so you know I don't really know what's going on.

A.O. Don't get up. Don't get up. We'll get that some time.

W.H. Oh that's O.K. You know I'm glad to be out of there. I can at least walk when I want to.

A.O. Well that's true. I'd be helpful if I could (she chuckles).

W.H. Well (unintelligible).

A.O. O.K. Oh, somebody drove in. Is that Mom?

W.H. No

A.O. Maybe it's an insurance adjuster.

W.H. Come on in.

A.O. By the way, don't talk to any adjusters if anything, now that I am representing you. Don't ever talk to any adjusters. Don't say anything. Tell them you have a lawyer. I'm going to give you one of my cards (conversation with person at the door) March of dimes. Wanda just got out of hospital. Stranger – How do you feel?

A.O. Oh, I see. Well, I'll tell you what we'll do with this. We'll send it to the insurance company. And tell them that there is this bill outstanding so that . . . see now what happened here.

W.H. Well see, there's a lot of stuff on there that I don't really understand. I told my mom to . . . let my brother see it before signing it.

A.O. Sure, sure.

W.H. All I know

A.O. That was today, too, wasn't it?

W.H. Ya.

A.O. See, ja, that's right . . . especially when you are on your way out you don't have to sign anything for them. They try to brow beat you. When you are on your way in it's rough because if you don't sign they won't take you in. That's bad. But once the whole thing is over I wouldn't sign anything. But anyway . . . see, what this is is a cognovit note. This is a promissory note of a kind, and what it says in effect is that if you don't make the payments as you had agreed to – its $50.00, $50 a month.

W.H. Unh huh

A.O. If you don't make the payments, they can sue you without your even knowing about it. That's what it says. Then they'll win the law suit and then they can garnishee your wages or whatever.

W.H. Unh huh

A.O. And that's what . . . I'll tell you what. I wouldn't feel too worried about this for this reason (phone bell rings). Shall I get it? I thought I heard someone. So anyway, I think that this shouldn't be too much of a problem because the insurance policy on their car pays up to $1,000.00 on medical payments, so this shouldn't be too hard. I agree with you that your mother should not have signed it. But be that as it may, I believe that it is a legitimate charge and probably is not unreasonable, and maybe it isn't too awfully bad. I'd sure like to

have a copy of this, but we better not let me have it until your mother knows that (unintelligible). Alright let's go over this once more. Let me give you one of my cards. I have a Cleveland office in the Standard Building, and this is in Montville. O.K. now remember I'm your lawyer now, so if anyone talks to you and he wants to discuss anything or sign anything, thta's out, you have a lawyer. Tell

sign anything, that's out, you have a lawyer. Tell him who I am. Tell anyone who wants to know who I am. Say this is my lawyer and I'll take care of everything. Alright it was 30 hours a week. How long did you work there, Wanda?

W.H. I can't really remember when I started, but it's been about 2½ months.

A.O. Unh huh. O.K. I thought I mentioned this. But you wouldn't have to pay me anything for this, but when we collect, I'd get a third, and you would get two thirds. see? So that you don't have to worry if we lost everything. You wouldn't owe me, but I feel positive we're going to get some money out of this. I feel positive that we'll come through pretty good. Now, another thing is I would like to have taken some pictures of you but I don't have any flash bulbs with me. I left them at home. I'd sure like to get some snap shots of you (she chuckles) on your crutches. You didn't hurt your head or anything? – of bump it?

W.H. No – I hit my head, I had a bandage across my head. It was all cut up, but it is pretty well healed now.

A.O. I see

W.H. I guess that's why I knew I couldn't remember anything. (Unintell.)

A.O. I must say, you are a very pretty young lady (she chuckles). My gosh. Were you in the same room with Carol?

W.H. Yes

A.O. Oh, that worked out good.

W.H. Unh huh

A.O. Unh huh o.k. Where do you go to night school?

W.H. Harvey.

A.O. Well, good for you. You're not a high school graduate?

W.H. No. See, you know, I need only 1-2 credits to graduate. (Unintell).

A.O. I see. Very good. It's much to your credit. You should be proud of yourself (she chuckles). O.K. What I'm going to do now, Wanda, is I'm going to make up some forms, and they're going to be your authority for me to get your hospital records. See, the hospital won't give me a record unless, it will give it to you because it involves you, but the hospital doesn't know who I am. So if you make an affidavit, a sworn statement – authorizing the hospital to let me have the record. I'll have to go get them. I'll have to buy them. When we get them, they'll explain in there all of things that happened to you. – By the way, who is your doctor there?

W.H. Schultz

A.O. Oh, he also, huh?

W.H. Yeah

A.O. And any others?

W.H. No.

A.O. Unh huh. Let's see, you were there from the second of February 'til today (13 February 1974).

W.H. Unh huh. (unintelligible. she chuckles)

A.O. Was it noon today you came out?

W.H. A little before noon – 11:30

A.O. Unh huh. I had a trial Monday – 2 days ago in Chardon. Sort of involved in an automobile accident case (unintell). A lady was hit from the rear. But it was nowhere near like yours (chuckle). In their case the insurance co. did not want to pay, because they said it only dented the license plates, and couldn't get hurt very bad if that's all the harder the cars hit.

W.H. Yea

A.O. Well the lady says her neck was bothering her, so we make a big battle of it. And then we finally settled the case so that she paid all of her bills, and probably had some money left. O.K. so let's see. What's your birthday Wanda?

W.H. Aug 31, (chuckle) 1953, (unintell).

A.O. Now you can vote, too.

W.H. Yeah (chuckle)

A.O. No big deal, huh, (she chuckles). I ought to be running for office, then you could . . . well OK then I'll prepare some documents so that it'll give me all the authority to go ahead. And then, like I say, if anyone talks to you, don't have anything to do with anybody especially any kind of adjuster whatever, and keep away from them. Now, what did the Dr. say about your recover? Did he say ?could/will? recovery fully, that you are O.K.?

W.H. Yea (unintelligible).

A.O. I see.

W.H. I as far as – I go back to see him in 2 weeks.

A.O. Unh huh. On crutches 3 weeks?

W.H. Yes

A.O. Well I'm a little bit disappointed. Now your mother went – of course you wouldn't know about – I think this, of course, is most discouraging seeing what they signed her up for.

W.H. Yea

A.O. I think it's awfully bad, and I think she felt terrible too. Does your ma work? (unintelligible)

W.H. Unh huh. She just gets welfare payments.

W.H. She just gets welfare payments. (unintell)

A.O. Where does she get money to live?

W.H. My dad. Lot of back pay, social security.

A.O. Did your dad die?

W.H. Ya.

A.O. How long ago?

W.H. July 62, about 4 years.

A.O. Possibly 1970? o.k. now let's see he was a soldier I guess.

W.H. Yea

A.O. Unh huh. [Unintelligible]

And your mother's name?

W.H. Marie.

A.O. Oh that's right, Marie Holbert. I feel quite confident that we should get some money. I don't know.

You like to be optimistic, and get all that you can. And, but I feel quite strongly it ought to be taken care of. There are more people at the door. Well, so, O.K. I'll tell you what, Wanda, this is it for the present. I'll prepare some documents. And we can take care of them tonight (going to school tonight).

Oh that's right. Good for you (chuckle) good for you. You'll have to be driven –

W.H. No, my boy friend.

A.O. O.K. Can I see you in the morning?

W.H. I'm so used to getting up at seven o'clock

A.O. Why don't I see you at tomorrow morning, then?

W.H. O.K.

A.O. And that'll be all for now. I'll take care of everything. Don't talk to anyone. Because if anyone comes along to sign anything, or wants to take – nope, nope, just tell him nothing doing. I have a lawyer on the case. O.K.?

W.H. O.K.

A.O. Yes. I talked to her this morning in the hospital, and I think your brother was there was it.

W.H. My sister-in-law and –

A.O. Oh that's right. I was going to take pictures there but I was waiting for them to leave. I didn't want them to see me. I was sitting around waiting for them to leave. I don't know if they noticed that. I had a camera in my pocket. When they left I took about 8 pictures of Carol and all of the traction. Did they put you in traction?

W.H. No. I was just in bed (chuckle).

A.O. By the way, does it hurt bad now?

W.H. Well, I still have the pain, but it's not as bad as it was before in the hips.

A.O. How about your head?

W.H. No. I get headaches once in the while –

A.O. Probably is O.K. Yes, this disturbed me, but I don't think that there will be too much problem. Oh, that's right. You'll have to go see the doctor some more, won't you?

W.H. Yea

A.O. Oh yea, you don't know how much the bill will be for the doctor. This is only the hospital.

W.H. Yeh (ring)

A.O. Well, we're going to work on getting you a recovery. Ah, like I say we have twelve thousand.

[Conversation ceases.]

Supreme Court, U. S.
FILED
JUN 20 1
MICHAEL RODAK, JR., CLERK

76-1650

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1950

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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INDEX

	Page
Motion to Dismiss	1
Statement	1
Argument	5
Conclusion	11
Certificate	11

CITATIONS

Cases:

McCloskey v. Tobin, 252 U. S. 107, 64 L. Ed. 481, 40 Sup. Ct. 531 5

Cohen v. Hurley, 36 U. S. 117-124, 6 L. Ed. 2d 156-162 ..... 5, 7

N.A.A.C.P. v. Button, 371 U. S. 415 ..... 6, 7

United Mine Workers v. Illinois State Bar Association, 389 U. S. 217 ..... 6, 8

Goldfarb v. Virginia State Bar Association, 421 U. S. 773, 792-3, 95, Sup. Ct. 2004, 20016 9

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1950

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final judgment of the Supreme Court of Ohio be dismissed on the ground that it does not present a substantial federal question.

STATEMENT

This case concerns an order of the Court below suspending appellant from the practice of law in Ohio for an indefinite period for personally soliciting the personal injury claims of Carol McClintock and Wanda Lou Holbert of Chardon, Ohio, in violation of DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility.

The facts in this case are set forth in the opinion of the Court below. (Jurisdictional Statement p. 1a) Because there is a wide divergence between "relevant facts" found by the Court below and those set forth at pages 5-9 of appellant's Jurisdictional Statement we set forth in full the findings of fact by the Court below.

> "Albert Ohralik, respondent, was admitted to the practice of law in Ohio in March 1948. He is 55 years old and resides in Montville, Ohio. His law office is in Cleveland.
>
> "Relator, Ohio State Bar Association, filed a complaint with the Board of Commissioners on Grievances and Discipline against Albert Ohralik, alleging that he solicited the personal injury cases of Carol McClintock and Wanda Lou Holbert in violation of Dr 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility.
>
> "Most of the material events involved in this complaint occurred on or about February 13, 1974. In the early morning of that day, while at the Montville, Ohio, Post Office, respondent learned from the postmaster's brother that Carol McClintock, of Montville, and Wanda Lou Holbert, of Chardon, had been involved in a serious automobile accident. Neither Carol McClintock nor Wanda Lou Holbert were relatives or former clients of respondent. Both were, if anything, casual acquaintances. Upon learning of the accident, which had occurred on February 2, 1974, respondent telephoned Carol's mother, obtained her consent to visit Carol at the hospital, and, later that day, proceeded to the hospital where Carol was undergoing treatment for the injuries sustained in the accident.
>
> "Carol McClintock testified that, until respondent visited her in the hospital on February 13th, she did not know that he was a lawyer. She admitted to a casual acquaintanceship with him,

> which began with her visits to the Montville Post Office to pick up the family mail, and which was limited to a customary exchange of greetings on such occasions. She also knew that her father had purchased an automobile from respondent a number of years ago. Disputing this testimony, respondent insisted that Carol must have been aware that he was a practicing lawyer because, among other things, he had been a candidate for a political office and the fact was evident from his campaign literature.
>
> "After reviewing with Carol the legal merits of her cause and the need for proper representation, respondent obtained Carol's consent to handle the claim. Leaving the hospital, respondent drove to the home of Carol's parents, where he examined their automobile liability policy, discussed the law applicable to passenger guests, and obtained the address and directions to the home of Wanda Lou Holbert, a passenger in the automobile driven by Carol McClintock.
>
> "Wanda Lou was then 18 years of age. Respondent, upon being admitted to her home, advised Wanda that he represented Carol McClintock, and that he had a "tip" for her, namely: that she had a substantial legal claim for the injuries she had suffered while riding as a passenger in the automobile driven by her neighborhood friend, Carol. He further informed her he was prepared to supply her with the legal services necessary to capitalize on her claim. Respondent's representations induced Wanda to orally agree to engage him as her attorney in the matter.
>
> "The following day, February 14, 1974, respondent telephoned Wanda Lou for purposes of firming the client-attorney relationship begun the preceding day. The phone was answered by Wanda Lou's mother, who unceremoniously advised him that his services were not desired. Respondent retorted by pointing out that it was not she but

Wanda Lou, a competent consenting adult, who was his client.

"Respondent, in support of his claim that a binding agreement to engage his services had been made with Wanda Lou, introduced in evidence a tape recording of the February 13, 1974, conversation with Wanda Lou. The recording was made on respondent's recorder, hidden at the time of recording under respondent's coat, and made without the knowledge of Wanda Lou. Some of the recorded conversation indicates a consent by Wanda Lou to the utilization of respondent's professional services, but the conversation also demonstrates that this consent was induced and solicited by respondent.

"Thereafter, both Carol and Wanda attempted to disengage respondent's services. Wanda's attempt began immediately, and Carol's some time after February 1974. Respondent insisted he had a valid binding agreement with both, which he was determined would be performed. Respondent sued Carol McClintock on her signed agreement for the value of services rendered, and ultimately accepted a settlement in the amount of $4,166.66. He testified that, as to Wanda Lou Holbert, he will abandon his claim against her because of his belief that under the disciplinary rules an ethical question arises 'if a contract has its origin in a controversy.'

"Respondent's answer to the complaint denied violation of the above disciplinary rules and moved to dismiss the complaint, contending that the above provisions of the Code of Professional Responsibility are unconstitutional for repugnancy to the free-speech provision of the First Amendment to the United States Constitution.

"After hearings on November 24, 1975, and January 29, 1976, the board found that the respondent did, in fact, solicit the personal injury cases of Carol McClintock, and Wanda Lou Holbert, in

violation of DR 2-103(A) and DR 2-104(A), Code of Professional Responsibility.

"The board found respondent's defense, that the solitication of business by an attorney is protected by the First and Fourteenth Amendments to the United States Constitution, to be without merit and overruled respondent's motion to dismiss.

"Although not objecting to the findings of fact of the board, respondent renewed his motion to dismiss these proceedings on the ground that DR 2-103(A) and DR 2-104(A) are unconstitutional for the reason that they deprive respondent of free speech as guaranteed by the United States and Ohio Constitutions.

"This court overruled respondent's renewed motion to dismiss."

ARGUMENT

This court has held that rights under the Fourteenth Amendment to the U. S. Constitution were not violated by a state statute which made it a criminal offense for any person by personal solicitation to seek employment to prosecute or collect claims, including unliquidated claims for personal injuries. *McCloskey v. Tobin* (1920) 252 U. S. 107, 64 L. Ed. 481, 40 Sup. Ct. 531. The court said at page 107-109 "the evil against which regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty. (citations omitted) Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable. (citation omitted) The statute is not open to the objections urged against it."

This court recognized in *Cohen v. Hurley* 366 U. S. 117-124, 6 L. Ed. 2d 156-162 (overruled on other

grounds, *Spevack v. Klein* 385 U. S. 511) in the majority and dissenting opinions (p. 174 fn 34) that

> "History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. (ambulance chasing) That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigation long established, but the subject matter of the present investigation does not lack rational basis. It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with sufficient devotion to duties which a lawyer owes to the court, or that the 'payment of awards to persons to bring in legal business' is inconsistent with the personally disinterested position a lawyer should maintain."

Appellant asserts that he has a First Amendment right to personally solicit his legal employment, and, in support of that proposition he relies on the decisions of this court in *N.A.A.C.P. v. Button* (1963) 371 U. S. 415, and, *United Mine Workers v. Illinois State Bar Association* (1967) 389 U. S. 217. (Jurisdictional Statement p. 10)

However, absent from these cases is any indication of motive of pecuniary gain or the possible compromise

of ethical standards on the part of the attorneys involved. In fact, rather than supporting the conclusion that rules against solicitation constitute violations of the First and Fourteenth Amendments, the cases cited by Appellant provide some indication of this court's concern for the dangers of solicitation of legal representation for private gain.

Mr. Justice Brennan, speaking for the majority in N.A.A.C.P., supra, placed considerable emphasis upon the lack of desire for pecuniary gain or circumstances creating a danger of conflict of interest in that case, stating (371 U. S. pp. 441-443)

> "Objection to the intervention of a law intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, also derives from the element of pecuniary gain. Fearfully of dangers thought to arise from the element, the courts of several states have substantial regulations aimed at these activities. (fn omitted) We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally guaranteed civil rights. (fn omitted) There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of N.A.A.C.P. have not been shown to conflict with those of its

> members and nonmembers Negro litigants. * * *. Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular."

In *United Mine Workers v. Illinois State Bar Association*, supra, the court held that freedom of speech, assembly and petition guaranteed by the First and Fourteenth Amendments gave the United Mine Workers Union the right to employ an attorney on a salary basis to assist its members in the assertion of their legal rights 389 U. S. at pp. 221-222. The Court, however, noting that the Union had engaged in this practice since 1913, carefully examined the arrangement for any possibility that the attorney might be tempted, because of his dependence upon the Union for his economic welfare, to sacrifice the clients best interests (389 U. S. p. 224) and found that the prohibition of practices such as that engaged in by the United Mine Workers Union was "not needed to protect the State's interest in high standards of legal ethics." (U. S. 389, p. 225.)

Unlike the cases upon which appellant relies, it is clear from the findings of fact of the Court below that Appellant solicited his professional employment for personal gain. An examination of the findings of fact of the court below reveals misconduct which by any definition of propriety and fair play is offensive. Observe that Appellant secretly tape recorded his conversation with Wanda Lou Holbert by hiding his tape recorder under his coat. (Jurisdictional Statement pp. 8 and 3a) Also, that Appellant "testified that as to

Wanda Lou Holbert, he will abandon his claim against her because of his belief that under the disciplinary rules an ethical question arises 'if a contract has its origin in a controversy.'" Yet, four days after Appellant testified, as above, he sued Wanda Lou Holbert in the Chardon Municipal Court, Geauga County, Ohio, for $2,466.66, claiming a contract of employment.

The grief which Appellant has brought upon his two young clients (18 years of age when he solicited them) demonstrate the vital concern of the Court below in maintaining standards of professional conduct to protect the public from personal solicitation of legal employment. This compelling state interest has been acknowledged by this court in *Goldfarb v. Virginia State Bar*, (1975) 421 U. S. 773, 792-93, 95 S. Ct. 2004, 2016.

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as a part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States v. Oregon State Board of Dental Examiners*, 294 U. S. 608, 611-613, 55 S. Ct. 570, 571-572, 79 L. Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'. See *Sperry v. Florida*, 373 U. S. 379, 383, 83 S. Ct. 1322, 1325, 10 L. Ed. 2d 428 (1963); *Cohen v. Hurley*, 366 U. S. 117, 123-124, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156 (1962); *Law Students*

Research Council v. Wadmand, 401 U. S. 154, 157, 91 S. Ct. 720, 723, 27 L. Ed. 2d 749 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions."

CONCLUSION

For the foregoing reasons it is respectfully submitted this appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Motion to Dismiss has been mailed by first class mail with postage prepaid to Eugene Gressman, Counsel for Appellant, 1828 L. Street N.W., Washington, D.C. 20036.

JOHN R. WELCH
Attorney for Appellee

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

October Term, 1977

No. 76-1650

ALBERT OHRALIK,
Appellant,

v.

OHIO STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question presented	2
Constittuional provisions and rules	3
Raising the federal question	4
Statement of the case	5
Summary of argument	25
Argument	27
I. A Blanket Proscription of all Forms of Solicitation, Absent a Compelling State Interest, Is Not Justified by the History, the Purposes or the Rationale of the Current Rules Governing Solicitation	28
II. The Lawyer's Constitutional Right of Free Speech Extends To Those Acts of Solicitation That Do Not in Fact Impinge Upon Some Compelling Interest of the Public or of the Client	37
III. In This Case, the State of Ohio Has Advanced No Compelling Interest That Overcomes the Presumption That the Solicitations Reflected the Exercise of Appellant's First Amendment Rights	40
CONCLUSION	42

CITATIONS

Cases: **Page**

Bates v. State Bar of Arizona,
433 U.S. ___, 97 S.Ct. 2691 (1977) 25, 27, 28, 37

Chreste v. Louisville Ry. Co.,
167 Ky. 75, 180 S.W. 49 (1915) 33

Hightower v. Detroit Edison Co.,
262 Mich. 1, 247 N.W. 97 (1933) 34

Jacobellis v. Ohio,
378 U.S. 184 (1964) 5

Louisville Bar Assn. v. Hubbard,
282 Ky. 734, 139 S.W.2d 773 (1940) 33

McBride, In re,
164 Ohio St. 419, 132 N.E.2d 113 (1956) 30

McDonald, In re,
204 Minn. 677, 282 N.W. 677 (1938) 34

N.A.A.C.P. v. Button,
371 U.S. 415 (1963) 37

Napue v. Illinois,
360 U.S. 264 (1959) 5

State v. Rubin,
201 Wis. 30, 229 N.W. 36 (1930) 34

Time, Inc. v. Pape,
401 U.S. 279 (1971) 5

Virginia Pharmacy Board v. Virginia Consumer Council,
425 U.S. 748 (1976) 37

Constitutional provisions and rules:

First Amendment, U.S. Constitution 3

Ohio DR 2-103(A) 3

Ohio DR 2-104(A) 4

Ohio Supreme Court Rule XVIII 24

Miscellaneous:

ABA Proposal B, DR 2-104(A) 35

Annotation, 67 ALR2d 859 32

Christensen, *Lawyers for People of Moderate Means: Some Problems of Availability of Legal Services*
151 (1970) 29

Drinker, *Legal Ethics*, ch. VIII (1953) 28, 31

Freedman, *Lawyers' Ethics in an Adversary System*
112-115 (1975) 35

Johnston and Hopson, *Lawyers and their Work*
120-130 (1967) 35

Luther, *Legal Ethics: The Problem of Solicitation*,
44 A.B.A.J. 554 (1958) 30

Note, *Legal Ethics – Ambulance Chasing*,
30 N.Y.U.L. Rev. 182 (1955) 32

Note, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. Chi. L. Rev. 674 (1958) 29

Page

Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 Yale L.J. 1181, 1188-1189 (1972) 31

Radin, *Maintenance by Champerty*, 24 Calif. L. Rev. 48 (1935) 31

Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 Geo. Wash. L. Rev. 244 (1968) 29

Warren, *Solicitation of Legal Services – A Crime*, 22 Ohio St. L.J. 691 (1961) 30

In the

Supreme Court of the United States

October Term, 1977

No. 76-1650

ALBERT OHRALIK,
Appellant,

v.

OHIO STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANT

The appellant Albert Ohralik prays that this Court, upon a full review of the arguments and of the record, reverse the judgment of the Supreme Court of Ohio indefinitely suspending appellant from the practice of law in Ohio, and that this Court declare that said judgment impermissibly invades appellant's rights of free speech and discussion as guaranteed by the First Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, entered on December 15, 1976, is reported at 48 Ohio St.2d 217 and at 357 N.E.2d 1097. It is reproduced in Appendix A of the jurisdictional statement filed herein, p. 1a.*

The findings of fact and recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, dated May 18, 1976, are not reported. They are reprinted in Appendix B of the jurisdictional statement filed herein, p. 11a.

JURISDICTION

The judgment of the Supreme Court of Ohio, ordering appellant indefinitely suspended from the practice of law in Ohio, was entered on December 15, 1976. A timely motion for rehearing was entertained and denied on February 24, 1977. See p. 7a of Appendix A of the jurisdictional statement.

A so-called supplementary notice of appeal to this Court[1] was filed in the Supreme Court of Ohio on March 21, 1977. See p. 8a of Appendix A of the jurisdictional statement.

---

* References herein to "App. __" are to the printed Appendix being filed simultaneously herewith. References herein to "J.S.App. — " or to "Appendix A" or "Appendix B" are to the printed appendices at the end of the jurisdictional statement. "Tr. __" relates to the pages of the transcript of the hearing before the Board of Commissioners that have not been reprinted in the Appendix.

[1] An earlier and premature notice of appeal had been filed on January 4, 1977, prior to action on the petition for rehearing by the Supreme Court of Ohio. App. 2a.

The appeal was docketed in this Court in timely fashion on May 24, 1977, and probable jurisdiction was noted by this Court on October 3, 1977.

The jurisdiction of this Court rests on 28 U.S.C. §1257 (2).

QUESTION PRESENTED

Whether DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility are violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to suspend a lawyer indefinitely from the practice of law for having orally solicited his legal services with respect to two acquaintances injured in the same automobile accident, there being no claim or finding of misrepresentation, overreaching, fraud, encouraging of false claims, repeated acts of solicitation, or other activity impinging on the public interest or on the interests of the clients.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

DR 2-103(A), Ohio Code of Professional Responsibility:[2]

A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to

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[2] The entire Ohio Code of Professional Responsibility appears as a preface in 23 Ohio St.2d. Certain amendments to DR 2-103 and DR 2-104, not here relevant, were made in 1976 and appear in 44 Ohio St.2d xxi. The Code is promulgated by the Supreme Court of Ohio.

a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR 2-104(A), Ohio Code of Professional Responsibility:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

* * * * * * *

RAISING THE FEDERAL QUESTION

Appellant initially raised the federal constitutional issue now before this Court in his answer to the complaint filed before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. That answer, filed on October 9,1975, asserted "that DR 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility are unconstitutional since they deprive respondent of the rights of free speech as guaranteed to respondent by the First Amendment of the Constitution of the United States." App. 5a. That same federal constitutional claim also formed a basis for appellant's motion to dismiss the complaint, filed before the Board of Commissioners on November 17, 1975. App. 6a. The Board found this claim to be "without merit" and overruled the motion to dismiss. See p. 15a of Appendix B of the jurisdictional statement.

The First Amendment claim was reiterated and pursued by appellant before the Supreme Court of Ohio. There

he renewed his motion to dismiss the proceedings "on the ground that DR 2-103(A) and DR 2-104(A) are unconstitutional for the reason that they deprive respondent of free speech as guaranteed by the United States and Ohio Constitutions." See p. 4a of the opinion below, Appendix A of the jurisdictional statement. The Ohio court overruled this renewed motion to dismiss on September 17, 1976, making mention of that action in its opinion. *Ibid.*, and see App. 2a. The court thus considered and expressly rejected the federal constitutional claim.

STATEMENT OF THE CASE

A. Preliminary considerations

Because First Amendment rights have allegedly been infringed in this case, this Court must carefully review the evidence in the record to determine whether such evidence can constitutionally support a judgment suspending the appellant from the practice of law. See *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964); *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959). Thus, while the facts as found by the Board of Commissioners and by the Supreme Court of Ohio are entitled to significant weight, those findings are not the necessary equivalent of the factual assessments that this Court must independently reach. This Court remains free to ferret facts from the record that may differ from or add to those found below and that may be relevant to executing the constitutional task in this case. This statement of the case has accordingly been constructed to assist the Court in this respect, making due note of any differences between the findings below and the facts of record.

At the same time, it must be emphasized that appellant does not suggest that this Court relitigate and resolve all the contested issues of fact. Indeed, there are but few differences between the parties as to the basic facts in this case. For the most part, the facts as found by the Board of Commissioners (J.S.App. 12a-15a), and repeated almost word for word by the Supreme Court of Ohio (J.S. App. 1a-2a), fairly track the course of relevant events. Yet there are certain facts, relevant to the First Amendment claim, that the findings below either misstate or omit. Such facts, identified hereinafter, are to be found (1) in the testimony at the hearing before the Board of Commissioners, or (2) in the tape recordings that the appellant made of his conversations with the parents of one of his clients and with the other client herself.

A few preliminary words are also in order with respect to the taped conversations. There probably has never been a disciplinary case involving oral solicitation of legal business where most if not all of the alleged solicitation has been tape recorded. These conversations were recorded by appellant only after he had reason to believe, from his hospital room conversation with Carol McClintock, that he would likely be retained to represent her. The ensuing conversations with her parents, who confirmed the employment of appellant to represent Carol (App. 108a, 112a), and with Wanda Lou Holbert, the guest passenger in Carol's car at the time of the accident, were taped with the thought that it was time to begin collecting his evidentiary "work papers" if Carol really "wants me to go to work" (App. 93a). And in interviewing clients and witnesses, appellant frequently found that he could not "take all the information down fast enough." App. 83a. Hence, on such occasions he was prone to record the informational sessions on tape, as he did here.

The cassette tapes themselves are part of the certified record before this Court, and for the Court's convenience they may be listened to on any cassette tape recorder. Appellant's own transcriptions of those tapes were also submitted below and made a part of the certified record; they are reproduced in full at App. 92a-130a. The tapes and the transcripts were both made part of the record by stipulation. Tr. 8-9, 40. No question was raised and no finding was made reflecting on the authenticity, the accuracy or the virtual completeness of the tapes.[3] See App. 54a-56a, 58a-59a.

B. The relevant facts

The facts relevant to the constitutional inquiry in this case may be summarized as follows:

(1) In September of 1975, the appellee Ohio State Bar Association filed a complaint with the Board of Commissioners on Grievances and Discipline against the appellant. See App. 3a-4a. The complaint alleged that the appellant, known below as the Respondent, was guilty of the following misconduct:

> On or about February 13, 1974[4] Respondent learned that Carol McClintock and Wanda Lou

---

[3] The appellant affirmed that the tapes contained essentially all the conversations, save for the amenities of "hello and goodbye." App. 79a.

[4] The complaint inaccurately implies that February 13, 1974, was the date on which appellant first learned that Carol and Wanda Lou had been injured in an automobile accident. That inaccuracy is repeated in the findings of fact below, leaving the implication that

(continued)

Holbert of Chardon, Ohio, had been injured in an automobile accident. He then contacted Albert and Helen McClintock, the parents of Carol McClintock. Upon being informed that Carol McClintock was in the hospital, Respondent went to see her and advised her as to her legal rights. She thereupon employed Respondent to represent her as to her claims arising out of the accident.

On or about February 13, 1974, Respondent also went to the home of Wanda Lou Holbert and interviewed her regarding the accident. During such interview, Respondent advised Wanda Lou Holbert that she had a good claim for recovery for her injuries as a result of the accident and offered his services as an attorney to represent her. She thereupon employed Respondent.

Relator says that Respondent has violated DR-2-103(A) and DR 2-104(A) of the Code of Professional Responsibility

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[4] (continued)
appellant was an "ambulance chaser" and had dashed to the hospital on February 13 to solicit Carol as soon as he had heard of the accident. See J.S.App. 1a, 12a.

Actually, the accident occurred on February 2, 1974, some 10 days earlier. According to the appellant, who was the only person in a position to know, he first heard of the accident on the 4th or 5th of February. App. 49a. He was reminded of the accident again on February 13 by Fred Hoffman, the brother of the postmaster. App. 50a. The only contrary testimony was the hearsay statement by Mrs. McClintock, Carol's mother, that she understood "from the postmaster or somebody" that appellant had "learned about" the accident on February 13. Tr. 170. See pp. 10-12, *infra*.

(2) For many years preceding the events of 1974, appellant had been a prominent and esteemed attorney in a small township known as Montville, Ohio, maintaining a law practice both there and in Cleveland. App. 69a. He had an "attorney at law" placard in front of his Montville house, and had been active politically in the community. App. 62a, 72a. The findings of fact below (J.S. App. 1a-2a, 12a), while reflecting Carol McClintock's testimony (App. 36a) that she had not known appellant was a lawyer until he visited her in the hospital on February 13, acknowledged but did not resolve appellant's contrary testimony "that Carol must have been aware that he was a practicing lawyer because, among other things, he had been a candidate for public office and the fact was evident from his campaign literature" (J.S. App. 2a), and he "had displayed political campaign posters in his yard situated a mere mile from Carol's home" (J.S. App. 12a).

(3) Moreover, since 1968, appellant had maintained a mailbox in the Montville postoffice, which he often visited twice a day to pick up his mail. On those visits, while waiting for the mail to be distributed, he frequently saw and talked to Carol McClintock – perhaps two or three times a week. App. 50a.[5] Carol acknowledged that she had met appellant on these many occasions at the postoffice. App. 36a-38a. And the findings below stated that she "admitted to a casual acquaintanceship with him, which began with her visits to the Montville Post Office to pick up the family mail, and which was limited to a

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[5] When asked what his conversations were with Carol, appellant testified: "O, we would ask how was school, how is your boyfriend, what social functions are currently going on now, things like that. Just what was new in the life of a teenager." App. 50a. He also testified that it seemed that he met Carol more frequently than anyone else while waiting for the mail to be distributed. App. 49a.

customary exchange of greetings on such occasions." J.S. App. 1a-2a, 12a.[6] He had first met Carol in this fashion about four or five years prior to her 1974 accident. App. 50a. Appellant further testified that he also had met and become acquainted with Wanda Lou Holbert at these local postoffice gatherings, though he "didn't see her nearly as much" as he had seen Carol McClintock. App. 68a. Based upon this testimony, the findings below stated that Carol and Wanda "were, if anything, casual acquaintances" of the appellant. J.S. App. 1a, 12a. Neither was found to have been a relative or former client.

(4) On Saturday, February 2, 1974, Carol McClintock and Wanda Lou Holbert were seriously injured in an automobile accident. The McClintock automobile, which Carol drove with Wanda as her guest, was hit by another automobile driven by what turned out to be an uninsured motorist. Appellant gave the following uncontradicted testimony as to how he first became aware of this event (App. 49a, Tr. 177-178):

> Q. Calling your attention now to this accident of February 2, '74, will you tell us how you first became acquainted with this particular accident?
>
> A. Fred Hoffman told me about it. He is a brother of the Postmaster and he saw me in the post office.
>
> Q. The post office where?

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[6] The findings further stated that Carol "also knew that her father had purchased an automobile" from Ohralik a number of years earlier. She also testified that the McClintock family had bought Christmas trees from Ohralik. App. 36a.

> A. Montville, Ohio.
>
> Q. What day?
>
> A. Oh, either the 4th or the 5th of February. It was a Monday or Tuesday.
>
> Q. '74?
>
> A. Of 1974.
>
> Q. And this particular accident or incident we are talking about occurred on February 2nd of '74; is that right?
>
> A. That's correct, yes.

There was, of course, no claim and no evidence that the appellant tried to contact either victim of the accident prior to February 13, 1977, some eleven days after the accident. The only testimony that could be construed as indicating that appellant did not learn of the accident until the morning of February 13, when he first visited Carol in the hospital, was plainly incompetent and speculative. In response to an unrelated question, Mrs. Helen McClintock (Carol's mother) volunteered the following bit of conjectural hearsay (Tr. 170):

> It was about somewhere between 11 and 13 days after Carol's accident that he [appellant] finally went down to see her and he learned about it. I understand that from the postmaster or somebody down there in Montville.

Mrs. McClintock was in no position to know when appellant first heard about the accident. Yet, without specific reference to Mrs. McClintock's hearsay statement or to

any other testimony, the findings below (J.A. App. 1a, 12a) commence with the following erroneous and unsubstantiated statements:

> Most of the material events involved in this case occurred on or about February 13, 1974. In the early monring of that day, while at the Montville, Ohio, Post Office, respondent [Ohralik] learned from the postmaster's brother that Carol McClintock, of Montville, and Wanda Lou Holbert, of Chardon, had been involved in a serious automobile accident. . . . Upon learning of the accident, which had occurred on February 2, 1974, respondent telephoned Carol's mother, obtained her consent to visit Carol at the hospital, and, later that day, proceeded to the hospital where Carol was undergoing treatment for the injuries sustained in the accident.

Thus the findings below, like the complaint first leveled against the appellant (see paragraph (1), note 4, above), are without any credible record support in their effort to portray appellant as an "ambulance chaser," eager to dash to the hospital to solicit business as soon as he hears of an accident.

(5) It may well be that the aforesaid findings reflect a certain amount of confusion and misunderstanding about what did happen in the "early morning" of February 13. It is a fact that the fateful morning of February 13 started with a discussion between appellant and Fred Hoffman, the postmaster's brother, in the Montville postoffice. But it is also a fact – which seems to have escaped the fact finders below and which may have been lost in Mrs.

McClintock's retelling of her hearsay information – that this was the second discussion between appellant and Fred Hoffman concerning Carol's accident. The first occurred on February 4 or 5, when Hoffman first told appellant about the accident. And the second discussion occurred on the morning of February 13, some eleven days after the accident and some eight or nine days after appellant first learned of the accident. It was with reference to this second discussion on February 13 that appellant testified, without contradiction, as follows (App. 50a-51a, Tr. 179-180):

> Q. Now, after February 4th or 5th of '74, did anyone remind you that Carol McClintock had been involved in an accident?
>
> A. Yes. Fred Hoffman had brought it up on the 13th or he – I don't know. We made conversation on the 13th about her injury.
>
> Q. On February 13, '74, after your conversation with Fred Hoffman, did you do anything regarding Carol McClintock?
>
> A. Yes.
>
> Q. Go ahead.
>
> A. Yes, I spoke with my brother Carl who also lives there in the neighborhood, and I told him that Carol had apparently been disabled from her accident and, "I wonder if we ought not go visit her and cheer her up." He said, well, it would be nice, but he is committed that day and he couldn't make it.

Q. Did you visit Carol McClintock or did you do something before visiting her?

A. I did something before.

Q. What did you do?

A. I phoned her mother and I said that I heard Carol was banged up in an accident, and I wondered how serious it was and whether she was still confined, and she said yes, that she's in the hospital in Painesville, and so then I said "Gee," I said, "yes, I thought we could probably cheer her up." She says, "Isn't one of you an attorney?" I said, "Yes, both my bother and I are attorneys," but I said, "that is not why I am calling you. I just thought it would be a nice friendly thing to cheer her up," and that we are good friends.

The findings adopted by the Supreme Court of Ohio (J.S. App. 1a) serve to confirm appellant's account, stating that on February 13 he "telephoned Carol's mother, obtained her consent to visit Carol at the hospital, and, later that day, proceeded to the hospital where Carol was undergoing treatment for the injuries sustained in the accident."[7]

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[7] It is noteworthy that the Supreme Court did not adopt the Board of Commissioners' additional remark (J.S. App. 12a) that, after the February discussion with Fred Hoffman, appellant "concluded it would be a good thing to contact Carol" and "thereupon telephoned her parents."

Mrs. McClintock also confirmed appellant's account by testifying that appellant had called her that morning to inquire about Carol's condition, and "he wanted to know if he could go and see her, he might be of some help to her." Mrs. McClintock said to him in reply: "I don't know. You can go see her as far as I am concerned." App. 44a.

[8] According to appellant, Mrs. McClintock had asked him on the phone, "Are you going to go and visit her today?" When he replied, "Yes, I thought I would," Mrs. McClintock said, "Would you please stop at our house before you go." Appellant agreed to do so. App. 51a.

(6) While Mrs. McClintock testified that in this initial telephone call appellant broached the question whether Carol needed an attorney (App. 44a-45a), none of the findings below support that testimony, which differs widely from appellant's version of the conversation (App. 51a). What is clear, however, is that the appellant went to visit Mr. and Mrs. McClintock before he went to the hospital to see Carol (App. 45a, 51a).[8] He did not have his tape recorder with him on this visit, since he had no reason to believe that he would be retained to represent Carol (App. 52a). During this initial visit with the McClintocks, appellant found that "they were very worried that the Holberts might sue the McClintocks because the automobile that she [Wanda Lou Holbert] was injured in was owned by Mr. McClintock" (App. 52a). Appellant allayed their fears by explaining "the significance of the guest statute, and I told them they really probably had nothing to worry about on the basis of the guest statute, and I told them that most likely there was no negligence on the part of Carol anyway" (App. 52a). According to Mrs. McClintock, on this visit appellant "talked about the accident, and he more or less was looking at the insurance papers . . . and wrote a bunch of stuff down" (App. 46a).

(7) From the McClintocks' house, appellant drove directly to the hospital in Painesville to visit Carol, again without his tape recorder. Appellant "commiserated with her on how she was trussed up with pulleys and how confining it was, and then she brought up in the conversation that some hospital administrator was urging a lawyer upon her, and I chuckled and I said, 'Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal' " (App. 53a). Carol's version of this visit, which was not reflected in any of the findings below, was that appellant "came into the hospital and told me that he was a lawyer and that he had talked to my mom and dad; and they called me and said that he had been to the house and that he wanted to come up and talk to me; and that he came up – well, he came up to the hospital and said he was a lawyer and that he had heard at the Post Office that I had been in a car accident and that I would need a lawyer" (App. 31a). She added that appellant "said that my bed was by a window overlooking the emergency entrance to the hospital when the ambulances came in, and that he had cards with him, and he said that I could chase ambulances for him, and he gave me some cards" (App. 31a). Obviously, the fact finders below gave no credence to this fanciful account of how a young girl in traction, and heavily trussed, was importuned to distribute appellant's professional cards to those arriving at the hospital by ambulance.

(8) The precise manner in which the subject of appellant being retained to represent Carol arose during this hospital room visit is not revealed by the record. But the subject did arise. And appellant was left with the impression that Carol was interested in having him represent her.

As he left the room,[9] Carol asked him to tell her parents to call on her to discuss the matter further. App. 56a. But whatever the extent of the discussion of this matter, it is clear that no written or oral agreement of representation was reached between appellant and Carol on this hospital visit. App. 53a. According to Carol herself, she "wanted to talk to my mom and dad first" (App. 32a) before entering into any such arrangement, which accounts for her request that appellant ask her parents to call on her. Such evidence, of course, undermines the finding below (J.S. App. 2a, 13a) that appellant "obtained Carol's consent to handle the claim" during this hospital visit.

(9) Acting in part to convey Carol's request to her parents, the appellant, upon leaving the hospital, "drove to he home of Carol's parents, where he examined their automobile liability policy, discussed the law applicable to passenger guests, and obtained the address and directions to the home of Wanda Lou Holbert, a passenger in the automobile driven by Carol McClintock." Findings below, J.S. App. 2a, 13a. But in the belief that he would likely be retained to represent Carol and thus should begin to collect the evidence necessary to pursue her claim, appellant stopped at his own home to pick up his tape recorder before arriving at the McClintocks' house for the second time on February 13. App. 54a. Thus the entire conversation with the McClintocks on this second visit has been preserved through the tapes, which are transcribed at App.

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[9] It was found below that appellant reviewed "with Carol the legal merits of her cause and the need for proper representation." J.S. App. 2a, 13a. No evidence was cited in support of that finding.

92a-117a. The major portion of that conversation, as the findings indicate, concerned the scope and nature of the McClintocks' automobile liability policy and the law applicable to passenger guests – matters which were of great concern to the McClintocks and as to which they were in need of legal advice. Appellant freely gave his legal advice to the McClintocks. And it was he who discovered that their policy with the Lightning Rod Mutual Insurance Co. included coverage of "$12,500 each person and $25,000 each accident" when injury was caused by an uninsured motorist. App. 95a. That coverage proved to be the basis upon which appellant was later to secure a full $12,500 benefit for Carol.

(10) The taped conversation with the McClintocks further reveals that, between the time when appellant left the hospital and his arrival at the McClintocks, Carol had phoned her parents, who agreed with her that appellant should be retained to represent her interests. The following conversation occurred in this connection (App. 108a):

> Ohralik: Mrs. McClintock, Carol had asked me to ask you folks to visit her tonight to talk with her, but Mr. McClintock thinks that she phoned you folks since then.
>
> Mrs. McClintock: Yes she did.
>
> Ohralik: I see.
>
> Mrs. McClintock: She said tell you to go ahead with it.
>
> Ohralik: All right, fine. I'll certainly do that..

And at a later point in the conversation, Mrs. McClintock reaffirmed that "you can tell them you're representing Carol" and that "[y]ou can do whatever you want to do." App. 112a. Thus Carol, having discussed the matter with her parents and using them as her agents, entered into an oral understanding with appellant to represent her – which further confirms the fact that no such understanding had been reached in the hospital room. And two days later, on February 15, this oral understanding was translated into a written agreement – as Carol testified (App. 32a) – in which appellant agreed to represent her for the usual one-third contingency fee. That agreement was signed by Carol in her hospital room, following a further discussion of the matter with appellant. App. 61a.

(11) Following his conversation with the McClintocks, appellant went to the home of Wanda Lou Holbert, who had recently returned from a hospital confinement. He received directions as to how to reach her home from the McClintocks. App. 95a. He went to the Holbert home for the purpose of interviewing her as "a witness to the cause of the accident and the circumstances surrounding the accident . . . [and not] for the purpose of soliciting her as a client." App. 58a. And in order to preserve whatever evidence she might be able to provide, appellant tape recorded his conversation with Wanda Lou. The transcription of that taped conversation appears at App. 118a-130a.

(12) The taped conversation with Wanda Lou was unable to provide any evidence as to the accident or its cause "because I hit my head on the dash" and thus was could remember nothing. App. 120a. But the appellant did tell her that he now represented Carol and that the McClintocks

had an uninsured motorist clause in their insurance policy that might be of benefit to Wanda. The critical portion of this conversation is as follows (App. 119a-120a):

> Ohralik: Then there is a policy that is kind of new. . . . They can go against their own company for up to $12,500.00, so we have a good claim, see, for up to $12,500.00, . . . in fact you have too, you know.
>
> Wanda: I do?
>
> Ohralik: Ya, you have a claim you have for money up to $12,500. So there is a little tip I'm telling you.
>
> • • • • •
>
> Ohralik: Are you going to file a claim on this, or . . .
>
> Wanda: I, ha, ha, ha, really don't know what's going on.
>
> Ohralik: Well, I could easily represent you as her if you want. I would be very happy to. What I do is, see it doesn't cost you anything. Just . . . anything we recover I get a third, see?
>
> Wanda: Uuh, Huh.
>
> Ohralik: If we get $3,000, I'd get one thousand, you'd get 2 thousand. And I could represent you just as well as them. See, it's the same kind of case – it's the

> same case. So, all you'd have to do is tell me it is O.K., and I would, I would represent you, if you want.
>
> Wanda: O.K.
>
> Ohralik: O.K.?
>
> Wanda: Unh Huh!
>
> Ohralik: And, let's see, we ought to get some information. Wanda, your address is what?

(13) The foregoing oral conversation constituted the only agreement ever made with respect to Wanda's desire to have appellant represent her on her claim under the McClintocks' insurance policy. No written agreement was ever made. The following morning, February 14, Wanda's mother attempted to repudiate the oral agreement; when the appellant called the Holbert home to talk further with Wanda, her mother answered the phone and informed appellant that "We talked it over and we don't want to sue nobody, and we don't want you as a lawyer." App. 24a. Appellant reportedly replied: "Well, Wanda is eighteen. She is her own boss and she can talk for herself. . . . [and when] Wanda gets to feeling better, I would like for her to call me back." App. 24a. Later, on March 14, Wanda herself wrote a letter to appellant, stating:

> I do not wish to sue anyone so, would you please contact anyone that you informed and tell them you are not my attorney, that is if you have told anyone. Thank you.

Prior to the receipt of this letter, appellant had made certain insurance demands on Wanda's behalf, but he never received or consummated any settlement offer for her.

(14) Appellant's relationships with Carol McClintock and her parents continued to be harmonious, and appellant pursued Carol's claim with vigor. The maximum recovery possible for her under the uninsured motorist coverage was $12,500. By April 11, appellant had sent the insurance carrier a demand that Carol be paid the maximum $12,500; and shortly thereafter, appellant received an acknowledgement from the carrier that her claim was indeed worth $12,500 and that this amount would be paid upon execution of the proper releases. Such releases were never executed, for on April 12, 1974, without prior warning, appellant received a communication from Carol discharging him as her attorney and demanding that he transfer his files to another attorney; she, as well as her new counsel, asserted that appellant's services were worthy of no compensation and that the requested releases would not be executed.

(15) As the findings below state (J.S. App. 3a, 14a), appellant insisted that he had valid binding agreements with both Carol and Wanda, which he demanded be performed. He in fact sued Carol on her signed agreement for the value of services rendered, and ultimately accepted a settelement in the amount of $4,166.66. As to Wanda, appellant abandoned his claim against her because of his belief that under the disciplinary rules an ethical question arises "if a contract has its origin in a controversy." But the Board of Commissioners noted (J.S. App. 14a) that no accusations or charges were leveled against appellant "for his conduct in clinging to the contracts of employment ob-

tained in the manner found above" and that there was, in any event, "insufficient evidence on which to base a finding that these activities, too, were violative of [appellant's] professional responsibilities." The Supreme Court expressed no disagreement with those conclusions of the Board of Commissioners.

(16) Finally, it should be noted that the Board of Commissioners found no evidence showing that appellant's "solicitation of Carol and Wanda Lou is part of an established or habitual course of conduct." Indeed, said the Board, "the only evidence of soliciting in the record is the pursuit of Wanda and Carol's causes." J.S. App. 14a. Here again, the Supreme Court of Ohio did not alter or disagree with such determinations.

The ensuing disciplinary proceeding stemmed from complaints registered by Carol McClintock and by Wanda Lou Holbert and her mother. See App. 24a-29a. The complaint signed by Wanda (Ex. 7) asserted that on February 13 appellant had come to her house "and asked me if he could be my attorney." In the words of her complaint: "I told him I would think about it. The next day he called me in the morning and I told him I did not want him. Thereafter, in spite of this, he told the insurance company and Bureau of Motor Vehicles that he was my attorney."

After a hearing before the Board of Commissioners, based upon these complaints, the Board concluded that the evidence "fully demonstrates" that appellant, in seeking and obtaining agreements from Wanda and Carol to represent them in their respective claims for damages arising

from the February 2 accident, "violated Disciplinary Rule 2-103A and 2-104A of the Code of Professional Responsibility." J.S. App. 15a. The Board accordingly recommended that appellant "be given a public reprimand." J.S. App. 15a.

On review, the Supreme Court of Ohio without explanation escalated the sanction from a public reprimand to an indefinite suspension from the practice of law.[10] And it added the comment that a "review of the record before us reflects ample, uncontraverted evidence supportive of the finding of the Board of Commissioners . . . that respondent, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A)." See J.S. App. 4a. The court made no identification of the so-called "uncontroverted" evidence, much of which had been fully controverted by the appellant's testimony and by the taped conversations. And the court made no effort to distinguish as between DR 2-103(A) violations and DR 2-104(A) violations. The court did reiterate, of course, its ruling that appellant's solicitation of business was not "protected by the First and Fourteenth Amendments to the United States Constitution." J.S. App. 3a.

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[10] Under Ohio Supreme Court Rule XVIII(6), set forth in 176 Ohio St. at lv, an attorney may be disciplined in one of four ways: (1) permanent disbarment, which precludes any possibility of future readmission; (2) suspension for an indefinite period from the practice of law, subject to possible reinstatement after the lapse of at least two years; (3) public reprimand; and (4) private reprimand.

SUMMARY OF ARGUMENT

This appeal presents one of the problems left unresolved in the last Term's decision in *Bates v. State Bar of Arizona*, 433 U.S. ___, 97 S.Ct. 2691 – whether and to what extent the in-person solicitation of clients constitutes an exercise of First Amendment rights, and whether and to what extent the state may control and punish such solicitation.

The traditional view of the bar has been that all forms of solicitation are evil and should be deemed unethical. But this view is an overstatement of the history, the purposes and the rationale of the disciplinary rules governing solicitation. Unfortunately, however, the broadly-written rules can be interpreted and applied in a broad and indiscriminate manner – as has happened in this case.

This Court's decisions have recognized that some forms of solicitation do constitute an exercise of First Amendment rights, and that the state cannot limit or outlaw those rights merely by labeling them as "solicitation." Nor can the state, under the guise of prohibiting professional misconduct, ignore the constitutional rights implicit in the act of solicitation.

What is ultimately critical in the assessment of any attempt to punish solicitation is the presence of some compelling state interest, or some injury to the solicited client. That injury, that interest, must be something more than a reiteration of the professional disdain for all forms of solicitation. There must be some element of fraud, deception, misleading, coercion, duress, compulsion, intimidation, threat, overpersuasion, overreaching or vexatious conduct. Without some such compelling interest having been asserted and proved, the presumption must remain that the act of solicitation was an exercise of the lawyer's First Amendment rights.

In this case, appellant has been found in violation of DR 2-103(A) and DR 2-104(A) in that he did solicit and obtain agreements to represent two clients. He represented them well, and he achieved a full monetary recovery for one of the clients. The state has made no claim that he has done other than solicit and obtain agreements. No claim or finding has been made with respect to misrepresentation, fraud, coercion, overreaching, or the like. In such circumstances, the indiscriminate application of the blanket prohibitions of DR 2-103(A) and DR 2-104(A) against solicitation must be deemed to have violated appellant's rights to free speech, as guaranteed by the First Amendment.

ARGUMENT

On June 27, 1977, in *Bates v. State Bar of Arizona,* 433 U.S. ____, 97 S. Ct. 2691, this Court held that the First Amendment prohibits a blanket suppression of an attorney's truthful newspaper advertisement concerning the availability and terms of routine legal services. At issue there was the constitutional validity of the American Bar Association's Disciplinary Rule 2-101(B), which had been adopted by the Supreme Court of Arizona.

The instant appeal brings into issue a closely related problem – the constitutional validity of two other Disciplinary Rules suggested by the American Bar Association, DR 2-103(A) and DR 2-104(A), which have been adopted and promulgated by the Supreme Court of Ohio. Those two rules are here questioned in First Amendment terms insofar as they constitute a blanket suppression of an attorney's truthful oral solicitation of two individuals in need of legal advice and representation. This issue, of course, was expressly reserved in the *Bates* opinion, the majority stating (97 S. Ct. at 2700) that

> ". . . we also need not resolve the problems associated with in-person soliciation of clients – at the hospital room or the accident site, or in any other situation that breeds undue influence – by attorneys or their agents or 'runners.' Activities of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising."

The present issue, in other words, is whether the free speech guaranteee of the First Amendment operates to vitiate a blanket and indiscriminate suppression of all

forms of oral solicitation by an individual lawyer. As will be seen, that issue is posed in the context of a situation, partly occurring in a hospital room of an accident victim, where no undue influence, no misrepresentation and no overreaching have been alleged or found. In the course of giving requested legal advice to acquaintances, an attorney has done no more than volunteer his services in pursuing legitimate insurance claims. Yet the Supreme Court of Ohio, without asserting any compelling state interest, has ruled that this kind of solicitation is *per se* unethical and that the First Amendment plays no role whatever in the application of DR 2-103(A) and DR 2-104(A) to the facts of this case.

It is appellant's position that the principles and the values implicit in the Free Speech Clause of the First Amendment render the Ohio ruling entirely unacceptable.

I. A BLANKET PROSCRIPTION OF ALL FORMS OF SOLICITATION, ABSENT A COMPELLING STATE INTEREST, IS NOT JUSTIFIED BY THE HISTORY, THE PURPOSES OR THE RATIONALE OF THE CURRENT RULES GOVERNING SOLICITATION.

The traditional view of the organized bar, as reflected in DR 2-103(A) and DR 2-104(A), has long been that solicitation, like advertising, is to be condemned as crass commercialization of the practice of law. That attitude is based in part on deeply ingrained feelings of tradition, honor and service, feelings that the promotion of justice, rather than the earning of fees, is the exclusive goal of the profession. See Drinker, *Legal Ethics* 210-212 (1953). But as was noted in *Bates*, 97 S. Ct. at 2703, since the belief that lawyers are somehow "above" the common trades has become an anachronism, "the historical foundation for the advertising restraint [and likewise the solicitation restraint] has crumbled."

The traditional viewpoint, moreover, has frequently ignored the needs of the multitudes of potential but untutored legal consumers, who often are ignorant of their legal rights or of the availability of competent lawyers to advise and to represent them in recognizing and implementing those rights. It is said that the public – including the untutored – would soon lose confidence in lawyers, the law and the courts if the bar were seen as merely another commercial enterprise. See Christensen, *Lawyers for People of Moderate Means: Some Problems of Availability of Legal Services* 151 (1970). The public interest and the public needs are somehow deemed better served if lawyers remain silent within their offices, unknown and unidentified to all but those who chance to hear of a particular attorney's availability and reputation. And it is often felt "that solicitation, with its emphasis on economic ends, may hamper the establishment of the proper attorney-client relationship." Note, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. Chi. L. Rev. 674 (1958). No public interest, no professional goal, is thought to abide in apprising unsophisticated persons that they have a lawful claim and a right to redress, or in permitting such persons, along with the affluent, to have their rights legally assessed and adjudicated. Far better that they forego securing legal assistance, far better that they surrender their legal due, than that they lose their "confidence" in the aloof legal system.[11]

This broad and undifferentiated condemnation of such practices as solicitation is nowhere better illustrated than in this case. The Supreme Court of Ohio, in apparent

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[11] See, generally, Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 Geo. Wash. L. Rev. 244 (1968).

but silent reliance on the unalloyed public evil of solicitation, has given not the slightest indication of any compromise or any exception to the fullest possible application of the DR 2-103(A) and DR 2-104(A) proscriptions. As the Ohio court once put it,[12] solicitation of business by an attorney, if it does not constitute moral turpitude, "is universally condemned as a gross impropriety, unworthy of a member of the legal profession, and, when proved, makes him amenable to such discipline as the gravity of his offense demands."[13]

But such a limitless reading of the public and professional bans on solicitation is not truly required by a careful analysis of the history, the purposes and the articulated rationale of the "unethics" of solicitation. From its common law antecedents of barratry, champerty and maintenance down to the modern excesses of "ambulance chasing," the notion of solicitation has been given fairly defined limits. Much of the literature and many of the decided cases seek to confine the solicitation concept within the borders of definable and detectable injuries to the interests of the public, the client or even to the legal profession itself. And when no such injury has been discovered, at least grudging if not enthusiastic

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12 *In re McBride*, 164 Ohio St. 419, 132 N.E.2d 113, 117 (1956). Ohio is one of the states that has supplemented its disciplinary code condemnation of solicitation by making criminal virtually all forms of paid solicitation of legal business. Ohio Revised Code §§4705.08, 4705.99, discussed in Warren, *Solicitation of Legal Services – A Crime*, 22 Ohio St. L. J. 691 (1961). See also New York Judiciary Law §479, making it unlawful for any person, or his agent, to solicit or procure through solicitation any legal business.

13 See, generally, Luther, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A.J. 554 (1958).

sanction has been accorded what would otherwise be blanketed under the broad, undifferentiated outlawry of solicitation.

Consider, for example, the justifications offered by responsible proponents of the solicitation ban. Leaving aside whatever general appeals they may make to professional and anti-commercialist ideals, these advocates invariably offer rationalizations that conceivably can be translated into specific cases where real evils or injuries are the products of solicitation:[14]

1. Stirring up litigation. It is frequently said that solicitation results in "stirring up litigation," though this idea has been slowly receding as realization grows that litigation often serves vital social functions.[15] But if the "stirring up litigation" phrase is traced to its antecedents in the medieval laws respecting barratry and champerty, which outlawed officious and commercialized intermeddling in another person's lawsuit,[16] then the modern anti-solicitation sanctions can be addressed to lawyers who actively and deliberately solicit harrassing or "malicious prosecution" type cases.

2. Bringing of fraudulent claims. It is also charged that solicitation breeds the institution of fraudulent claims. If an attorney is shown to have solicited a series of known

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14 See, e.g., Drinker, *Legal Ethics*, ch. VIII (1953); Luther, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A.J. 554 (1958).

15 See Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 Yale L.J. 1181, 1188-1189 (1972).

16 Radin, *Maintenance by Champerty*, 24 Calif. L. Rev. 48 (1935), which explores the confusing history of maintenance and champerty and their relationship to "stirring up litigation."

fraudulent claims, this solicitation concept becomes more manageable and translatable into prevention of a real evil.

3. **Corruption of public officials.** Often it is claimed that a soliciting lawyer of the "ambulance chasing" type will pay doctors, hospital attendants and policemen for information about prospective clients. This is a narrow but significant evil that can properly be dealt with in individual cases where such an evil has been shown in fact to result from solicitation.[17]

4. **Injury to clients.** One of the major charges against solicitation is that it may harm the client where the solicitation is marked by overreaching, overcharging or misrepresentation as to the legal services to be provided. And solicitation that is superimposed upon the physically or mentally ill patient, or upon an accident victim unable to manage his legal affairs, obviously injures the best interests of such a client. Such injuries, where proved, serve to define specific types of solicitation that by any standard merit condemnation and professional sanctions.

The important point that emerges from those rationalizations, assuming they can be applied to prove specific instances of unethical solicitation, is that there are numerous remaining instances of solicitation where these specific evils are not involved. The instant case is one of them. And various courts have not hesitated to cover this "soft spot" in the solicitation syndrome by ruling that a given act of solicitation that contains none of these evil characteristics does not warrant professional or ethical condemnation.

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17 See the collection of "ambulance chasing" solicitation cases in the annotation in 67 ALR2d 859. See also Note, *Legal Ethics – Ambulance Chasing*, 30 N.Y.U.L. Rev. 182 (1955).

Thus in *Louisville Bar Assn. v. Hubbard*, 282 Ky. 734, 739-740, 139 S.W.2d 773, 775 (1940), it was recognized that, however much the profession may view the practice with disdain, "an attorney may personally solicit business with impunity, where he does not take advantage of the ignorance, or weakness, or suffering, or human frailties of the expected clients, and where no inducements are offered them." And in *Chreste v. Louisville Ry. Co.*, 167 Ky. 75, 83-84, 180 S.W. 49, 53 (1915), the same Kentucky court had voiced an earlier sentiment that is most pertinent to this modern day:

> There are many forms of solicitation. Some lawyers seek business by advertising in the newspapers; others by sending out announcement cards; others by asking friends to send them business; others by applying directly, or through the medium of friends, for employment by firms and corporations; others buy stock in corporations, with the understanding that they are to be employed as counsel; still others invite to their homes and frequently entertain those who are likely to require the services of an attorney. Doubtless many solicit business in person, or through young lawyers or agents employed for that purpose. Manifestly, if every kind of solicitation, regardless of the form it may take, is to be condemned, then only in rare instances would there be such a thing as a valid contract of employment between a lawyer and his client. If some forms are to be permitted, while others are to be condemned, where shall the line be drawn? . . . If it be

lawful for an attorney to send out announcement cards, or insert an advertisement in the newspaper, . . . how can it be said that if he solicits business in person, or by an agent, that the public interest will be so endangered that any contract obtained under such circumstances will be contrary to public policy? . . . But it must be remembered that there is a wide difference between what is undignified or unbecoming conduct on the part of the attorney and what is clearly contrary to public policy. Such conduct may be disapproved of by the courts and by those representatives of the profession who are concerned in seeing that its standards are never lowered, and, yet, it may fall far short of being so injurious to the interest of the public as to invalidate a contract of employment thus obtained . . . . the consequences that would follow the rule that mere solicitation is contrary to public policy would frequently be antagonistic to the public interest, in that it would prompt solvent firms or corporations to make unfair settlements, in the absence of counsel, in the hope that the fee of the attorney might be defeated by a plea that the contract of employment was obtained by solicitation.

To the same general effect, see *State v. Rubin*, 201 Wis. 30, 229 N.W. 36 (1930); *Hightower v. Detroit Edison Co.*, 262 Mich. 1, 247 N.W. 97 (1933); *In re McDonald*, 204 Minn. 677, 282 N.W. 677 (1938).

Thus the realities of the legal profession have forced the courts and the comentators away from a rigid and moralistic interpretation of the solicitation ban. There has never been, there is not, and there can never be a total, blanket condemnation of solicitation in all its manifold forms.[18] One need read no further than subparagraph (1) of DR 2-104(A) to realize that the codifiers of that rule have left the door wide open to a lawyer's personal solicitation of the legal business of "a close friend, relative, former client . . . or one whom the lawyer reasonably believes to be a client." Can it be, then, that the ethics of what this appellant did and the indefinite suspension that he has suffered all depend upon the closeness of his friendships with Carol McClintock and Wanda Lou Holbert? Had they been truly close friends, would appellant have been entirely free to solicit them as he did?

Perhaps the ultimate proof that the progenitors of the anti-solicitation rules are moving away from an overly-rigid formulation and application of the ban is afforded by one of the recent proposals of the American Bar Association for rewriting DR 2-104 (A) in the light of the *Bates* decision. In what is known as the Association's alternative Proposal B, a completely recast DR 2-104(A) has been circulated to the highest state courts for their consideration. See 46 Law Week 1 (Statute section, Aug. 23, 1977). This alternative proposal would cause DR 2-104(A) to read (46 Law Week at 12):

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18 See Freedman, *Lawyers' Ethics in an Adversary System* 112-125 (1975); Johnstone and Hopson, *Lawyers and their Work* 120-130 (1967); Rosenthal, *Lawyer and Client: Who's in Charge?* 135-141 (1974).

DR 2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice if:

(1) The advice embodies or implies a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B); or that violates the regulations contained in DR 2-101(C); or

(2) The advice involves the use by the lawyer of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct.

Had that proposal been in effect in Ohio at the time of appellant's activities in 1974, he could not have been charged with violations of DR 2-104(A) – for there never was any suggestion or claim that he was guilty of making false, fraudulent or misleading statements to Carol or Wanda or of engaging in any coercive or threatening actions with respect to them. Nor was there any evidence or assertion that he had been overpersuasive, overreaching or harassing. And had this proposal been in effect in Ohio in 1974, this Court would not now be confronted with the task of assessing the constitutionality of the present version of DR 2-104(A). But whatever might or might not have been, the fact remains that the proposed rewriting of this rule in and of itself reflects a dramatic shift in the traditional attitude of the bar toward oral solicitation of legal business.

II. THE LAWYER'S CONSTITUTIONAL RIGHT OF FREE SPEECH EXTENDS TO THOSE ACTS OF SOLICITATION THAT DO NOT IN FACT IMPINGE UPON SOME COMPELLING INTEREST OF THE PUBLIC OR OF THE CLIENT.

The foregoing discussion as to the nature of the professional attitude toward solicitation serves as a prelude to the constitutional analysis compelled by a blanket and indiscriminate application of DR 2-103(A) and DR 2-104(A). Indeed, it is fair to say that the types of solicitation that do no more than offend the professional feelings of tradition and honor are invariably the situations where the acts of solicitation become entitled to protection under the free speech clause of the First Amendment.

As a general proposition, lawyers are as entitled to First Amendment protections as anyone else. Whether their speech or communication be personal, political, professional or commercial, they are presumptively entitled to the full sweep of First Amendment freedoms in their professional activities. Commercial speech is now firmly embedded in the rock of the First Amendment. *Bates v. State Bar of Arizona*, 97 S.Ct. at 2698-2700; and see *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 761-768 (1976).

The lawyer's entitlement to the protection of the First Amendment in his daily chores is not easily dislodged. It is not enough, to deprive him of such protection, merely to pin the label of "solicitation" on what he had done or said. As the decision of this Court in *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963), makes clear, "a state cannot foreclose the exercise of constitutional rights by mere labels." Nor can a state, "under the guise of prohibiting professional misconduct, ignore constitutional rights."

Ibid., 439. And by placing solicitation within the area of First Amendment freedoms, *Button* conditions its control and regulation upon the presence of some "compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Ibid.*, 438.

And so the constitutional problem in the application of the generalized solicitation precepts of DR 2-103(A) and DR 2-104(A) becomes one of determining, in a given case, whether the acts of solicitation impinge upon some recognized and compelling public interest or inflict some real injury upon the interests of the solicited client. If, in a specific case of solicitation, the state can offer no greater justification for interference than its concern in promoting professional ethics, or its association with the traditional and professional disdain for any and all forms of solicitation, two things then become evident: (1) the state has failed to demonstrate a compelling interest in outlawing or penalizing the acts of solicitation; and (2) the acts of solicitation must remain within the protected area of the attorney's free speech.

The *Bates* case illustrates this method of constitutional analysis. There the state had attempted to impose a blanket rule against advertising upon a particular advertisement that exhibited no injury or threat of injury to the legitimate concerns of the state or the potential clients. The state made no claim that the advertisement contained any false, misleading or deceptive statements, or any elements of overreaching or misrepresentation. The only objections the state could bring to bear were the traditional but highly debatable propositions concerning (1) the supposed adverse effect of advertising on professionalism, (2) the supposed inherently misleading nature of attorney advertising, (3) the supposed adverse effect of advertising on the administration of justice, (4) the supposed undesirable economic effects of lawyer advertising, (5) the supposed adverse effect of advertising on the quality of legal service, and (6) the difficulties that might arise in enforcing any future limitations on misleading and decptive advertising. 97 S. Ct. at 2701-2707. The state, in other words, offered nothing more than the traditional arguments of the legal profession respecting advertising. Such arguments, such ethical considerations, simply did not qualify as the requisite compelling interests, thus leaving the particular advertisment in the commercial realm of free speech.

On the other hand, if the state can prove that the advertisement or solicitation in some way invades the legitimate interests and concerns of the state or the client, the lawyer's action may then lose its First Amendment shield. The lawyer has no First Amendment right to make false or misleading advertising claims. No does he have any First Amendment right to solicit legal business by making false or deceptive statements, or by using coercive or harassing techniques.

The constitutional sum of it all is that the lawyer's act of advertising or soliciting is presumptively an exercise of his free speech rights. That presumption cannot be overcome by resort to ethical arguments, many of which are highly questionable if not totally erroneous. The legal profession's historic sense of honor, its disdain for commercialism, simply cannot do battle with the deep and cherished values of the First Amendment. If all the state can say is that it is enforcing the profession's code of professional responsibility, a code that on its face condemns both the good and the bad forms of solicitation, the First Amendment presumption must prevail. In this sense, the free speech qualities of solicitation are in direct correlation with the professionally abstract qualities of the state's asserted concerns.

III. IN THIS CASE, THE STATE OF OHIO HAS ADVANCED NO COMPELLING INTEREST THAT OVERCOMES THE PRESUMPTION THAT THE SOLICITATIONS REFLECTED THE EXERCISE OF APPELLANT'S FIRST AMENDMENT RIGHTS.

This case is highlighted by the fact that the state, through its disciplinary authorities, has made no more serious a conclusion than that the appellant did make two solicitations of legal business. The state has done no more than apply the blanket solicitation proscriptions of DR 2-103(A) and DR 2-104(A) in an equally indiscriminate manner.

There has been no claim, and certainly no finding, that the appellant gave any advice or made any statement to Carol McClintock or to Wanda Lou Holbert that was false, fraudulent, misleading or deceptive. There has been no claim, and certainly no finding, that in making these solicitations the appellant used any coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct. Cf. the Proposal B revision of DR 2-104(A), 46 Law Week at 12. The critical finding of the Supreme Court of Ohio was that appellant violated DR 2-103(A) and DR 2-104(A) simply by "soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them in their respective claims for damages arising out of the accident of February 2, 1974." J.S. App. 4a.

But to say merely that appellant solicited and obtained agreements is to concede that appellant was exercising his rights of free speech under the First Amendment. It will not do to label that exercise of free speech as mere solicitation. If Ohio has any more serious charge than solicitation to hurl at appellant it has yet to do so.

The record in this case is rich in detail, for it shows an attorney instinctively reacting to the misfortunes of two

acquaintances and freely offering his advice and services to their felt needs. The patent efforts of the two young clients to portray him as an "ambulance chaser," passing out his professional cards wholesale and proclaiming that he was a lawyer each time he entered the doorway, apparently fell on deaf ears below. And while the findings do have some serious factual errors, particularly in regard to time sequences (see pp. 10-14, *supra*), the ultimate finding as to solicitation is not in dispute. What is important, however, is that this ultimate finding puts the ultimate constitutional question – whether an attorney may be suspended from practice for having exercised his First Amendment right to solicit and obtain agreements from two clients in a benign manner. See pages 18 and 20-21, *supra*, as to the natural and friendly circumstances surrounding the two solicitations.

To repeat, DR 2-103(A) and DR 2-104(A) are blanket prohibitions of solicitation. They have been applied in this instance in an indiscriminate manner, to outlaw legitimate expressions of free speech and to destroy the reputation and livelihood of a lifetime lawyer. Not one legitimate state interest has been advanced to support such a result. Not one claim has been made that the interests of Carol McClintock and Wanda Lou Holbert were in any way harmed by appellant's vigorous and successful efforts to represent them.

As thus applied, DR 2-103(A) and DR 2-104(A) must be deemed to have violated appellant's free speech rights under the First Amendment.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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November 17, 1977

Supreme Court, U. S.
FILED
DEC 20 1977
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

In the

Supreme Court Of The United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLEE

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INDEX

	Page
Question Presented	1
Statement of the Case	
A. Preliminary Considerations	2
B. The Relevant Facts	4
Summary of Argument	16
Argument	
Solicitation of professional employment that is marked by undue influence, overreaching, deception, misrepresentation or other like conduct is harmful to the client and not protected by the First Amendment.	17
Conclusion	26
Certificate of Service	26

CITATIONS

Bates v. State Bar of Arizona, 433 U.S. ..., 97 S.Ct. 2691, 45 L.W. 4895	16, 17, 19
Constitutional Provision and Rules	
First Amendment U.S. Constitution	1
Ohio DR 2-103(A)	2
Ohio DR 2-104(A)	2

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ALBERT OHRALIK,

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v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLEE

QUESTION PRESENTED

Whether DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility are violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to discipline a lawyer for in-person solicitation of his legal services to persons injured in the same automobile accident who were, if anything, casual acquaintances.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

DR 2-103(A), Ohio Code of Professional Responsibility:[1]

A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR 2-104(A), Ohio Code of Professional Responsibility:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: [Exceptions not applicable here.]

STATEMENT OF THE CASE

A. Preliminary Considerations

Appellant concedes that the facts found by the Ohio Supreme Court "fairly track the course of relevant events." (Brief of Appellant p. 6). Appellee agrees.

However, appellee cannot agree with the "few preliminary words *** with respect to the taped conversations" of appellant and Wanda Lou Holbert and appellant and the parents of Carol McClintock.

Appellant states:

> "These conversations were recorded by appellant only after he had reason to believe from his hospital conversation with Carol McClintock that he would likely be retained to represent her. The ensuing conversation with her parents, who confirmed the employment of appellant to represent Carol (App. 108a, 112a) and with Wanda Lou Holbert, the guest passenger in Carol's car at the time of the accident were taped with the thought that it was time to begin collecting his evidentiary 'work papers' if Carol really 'wants me to go to work.' (App. 93a) And in interviewing clients and witnesses appellant frequently found that he could not 'take all the information down fast enough.' (App. 83a) Hence, on such occasions he was prone to record the informational sessions on tape, as he did here." (Appellant's Brief p. 6)

[1] The entire Ohio Code of Professional Responsibility appears as a preface in 23 Ohio St.2d. Certain amendments to DR 2-103 and DR 2-104, not here relevant, were made in 1976 and appear in 44 Ohio St.2d xxi. The Code is promulgated by the Supreme Court of Ohio.

Appellee, like appellant, does not suggest that this Court relitigate and resolve all issues of contested fact. Nonetheless the above "few preliminary words with respect to the taped conversations" do not comport with the facts of this case. The references to the Appendix, cited by the appellant, are to the Transcription of his tape recorded conversations with the parents of Carol McClintock. At the time he secretly tape recorded that conversation in the McClintock's home, his only purpose for being there was to deliver a message from Carol to her parents that Carol wished her parents to visit her in the hospital that night, February 13, 1974. In appellant's words "I would have no excuse to go otherwise." (App. 86a) And the reason appellant gave for tape recording that conversation was: "Well, I never knew what might develop when I was over there." (App. 87a)

Furthermore, it is not accurate to state that "No question was raised reflecting on the *** virtual completeness of the tapes." (Appellant's Brief p.7) Wanda Lou Holbert, the second solicited client did raise a question of the "completeness" of appellant's secret tape recording of their conversations. She stated that the tape recording did not contain all of their

conversations, that "Mr. Ohralik stepped inside the house and told me who he was and that he was representing Miss McClintock as her attorney, and that he had talked to her about the accident and that he would also like to talk to me about it and represent me as my attorney." (App. 21a)

The above conversation is not included on the tape recording or in the transcript of the tape furnished as evidence in this case by appellant. (App. 21a)

B. The Relevant Facts

Albert Ohralik, appellant, was admitted to the practice of law in Ohio in March 1948. He is 55 years old and resides in Montville, Geauga County, Ohio. His law office was in Cleveland.[2]

These proceedings were commenced in September 1975 when the appellee, Ohio State Bar Association filed a formal complaint against appellant, Albert Ohralik, with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The complaint alleged that appellant (Respondent below) was guilty of the following misconduct:

> "On or about February 13, 1974 Respondent learned that Carol McClintock and Wanda Lou Holbert, of Chardon, Ohio, had been injured in an automobile accident. He then contacted Albert and Helen McClintock, the parents of Carol McClintock. Upon being informed that Carol McClintock was in the hospital, Respondent went to see her and advised her as to her legal rights. She thereupon employed Respondent to represent her as to her claims arising out of the accident.
>
> "On or about February 13, 1974, Respondent also went to the home of Wanda Lou Holbert and interviewed her regarding the accident. During such interview, Respondent advised Wanda Lou Holbert that she had a good claim for recovery for her injuries as a result of the accident and offered his services as an attorney to represent her. She thereupon employed Respondent.
>
> "Relator says that Respondent has violated DR 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility."

Most of the material events involved in this case occurred on February 13, 1974.

Early in the morning of that day, appellant telephoned the home of Carol McClintock and talked to Mrs. McClintock, mother of Carol. There is a wide divergence between the testimony of Mrs. McClintock and appellant as to the content of that telephone conversation. Mrs. McClintock testified that appellant offered his services as a lawyer, inquired about their insurance coverage and asked if he could visit Carol in the hospital. (App. 44a-45a) Appellant testified that he telephoned Mrs. McClintock to inquire about Carol's health and whether he might visit Carol in the hospital and that Mrs. McClintock asked him to stop at their home before he went to the hospital. Appellant did not say why he was to visit the McClintock's home before visiting Carol. (App. 51a)

---

[2] Mr. Ohralik's law office was in Cleveland "until he retired from law practice to Geauga County. He has had occasional clients, and a rather small law practice in Geauga County, though there was a smart increase in the 1970's. Despite the overall small volume, he has been 4 times taken to task by the Geauga County Bar Association within the last one year and five months." (Affidavit Brief of Albert Ohralik, May 16, 1974, in response to grievance filed against him by Wanda Lou Holbert.) (Rel. Ex. 3 a-c; TR 8-9)

TR — refers to designated pages of transcript.

Two uncontroverted facts emerge from this testimony. One. Appellant initiated the contact by calling the home of Carol McClintock and talking to Carol's mother about Carol's automobile accident and her injuries. Two. Appellant's desire to visit Carol in the hospital.

Later that morning appellant proceeded to the hospital in Painesville, Ohio, where Carol McClintock was undergoing treatment for the injuries she sustained in the accident. She had suffered two fractured legs, face lacerations, contusions and other injuries, and was in traction and under medication at the time of appellant's visit. (App. 34a, 35a, 44a, 53a)

With respect to that first visit of appellant at the hospital, Carol testified that the date was February 15, 1974, but in fact it was February 13. She said:

> "He came into the hospital and told me that he was a lawyer and that he had talked to my mom and dad; and they called me and said that he had been to the house and he wanted to come up and talk to me; and he came up — well, he came up to the hospital and said that he was a lawyer and that he had heard at the Post Office that I had been in a car accident and that I would need a lawyer:
>
> "Q. Did he have any written documents with him?
>
> "A. He had some typing paper with a contract written up on it, you know, typed up on it.
>
> "Q. What did he do with that?
>
> "A. Well, he read it to me and told me that he was a lawyer and asked me if I would like to have him to take my case.
>
> "Q. What did you tell him?
>
> "A. That I wanted to talk to mom and dad first."

(App. 31a, 32a)

Carol also testified that this first meeting with appellant lasted a half hour to forty-five minutes. (App. 32a)

Appellant's testimony tends to confirm Carol's testimony as to the approximate length of the visit, but not the content of their conversation. Appellant testified: (App. 53a-54a)

> "Q. Will you relate what conversation you had with Carol McClintock on that particular date and time?
>
> "A. Oh, I told her it was certainly a mess how a drunk driver could cause her those problems.
>
> "Well, I think we first commented on the butterflies that she had decorated in her room, and then I commiserated with her on how she was trussed up with pulleys and how confining it was, and then she brought up in the conversation that some hospital administrator was urging a lawyer upon her, and I chuckled and I said 'Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal.
>
> * * *
>
> "Q. How long did you spend with Carol McClintock on this particular visit?
>
> "A. Oh, I guess about maybe 40 minutes to an hour maybe.
>
> * * *
>
> "Q. Did you reach an agreement to represent Carol McClintock at that particular visit?
>
> "A. No.
>
> "Q. Did Carol McClintock and you enter into an agreement on that particular visit?
>
> "A. No. Not on that visit, no.

"Q. I'm talking about either written or oral.
"A. On the day?
"Q. On February 13th.
"A. Yes, I arrived at an agreement — oh, not directly with her. Her parents told me.
"Q. I asked you did you and Carol McClintock enter into an agreement on that particular date and time, either written or oral, to represent her?
"A. Well orally, I did through an agency of her parents.
"Q. Do you understand the question?
"A. Well, unless I am confining it to talking to her directly —
"Q. I am talking about a visit at 11:00 o'clock in the morning on February 13, 1974, did you enter into an agreement either written or oral to represent Carol McClintock?
"A. No.
"Q. When you concluded your visit with Carol McClintock, what did you do in connection regarding this matter?
"A. Well, she asked me to tell her parents to come up and visit her that night, so I went home and got my tape recorder and I went to the McClintock home.
"Q. On the same date?
"A. Yes.
"Q. At what time?
"A. I got there about 1:00 o'clock, I guess.
"Q. Who was present?
"A. Mr. McClintock and Mrs. McClintock.

* * *

"Q. Where did you have the tape recorder?
"A. Under my rain coat on the kitchen table."

However, it appears that appellant did more than talk to Carol about the butterflies decorating her room and commiserating with her about her injuries, he also took 8 pictures of Carol and all of her traction.

(App. 129a. Transcription of taped conversation of appellant and Wanda Lou Holbert, February 13, 1974.) (A.O. — Albert Ohralik, W.H. — Wanda Holbert)

"A.O. Yes, I talked to her this morning in the hospital, and I think your brother was there was it.
"W.H. My sister-in-law and —
"A.O. Oh that's right. I was going to take pictures there but I was waiting for them to leave. I didn't want them to see me. I was sitting around waiting for them to leave. I don't know if they noticed that. I had a camera in my pocket. When they left I took 8 pictures of Carol and all of the traction. Did they put you in traction?
"W.H. No. I was just in bed (chuckle)."

Leaving the hospital, appellant drove to the scene of the accident, photographed it, and then proceeded to his home to pick-up his tape recorder. From his home appellant proceeded directly to the McClintock home where he examined their automobile liability insurance policy, discussed the law applicable to passenger guests, and obtained the address of Wanda Lou Holbert, the passenger in the automobile driven by Carol McClintock. Appellant's conversations with the McClintocks in their home on this second visit was secretly tape recorded by appellant with the tape recorder hidden under his rain coat.

Why appellant photographed the scene of the accident is not clear. According to appellant, he had not been employed to represent Carol when he left the hospital.

Why appellant drove to his home to pick-up his tape recorder before proceeding to the McClintock home is equally unclear. The only message appellant was to

deliver to Carol's parents was a request that they visit her that night.

With respect to those matters, appellant testified: (App. 86a, 87a)

"Q. Mr. Ohralik, when did you take these pictures at the scene? You said you had been at the scene?
"A. Yes. On my way back from — let's see. On my way back from Carol.
"Q. At the hospital?
"A. Yes
"Q. Now you hadn't been engaged to represent her at that time?
"A. Yes, that's true.
"Q. You just came by and took some pictures because you were curious?
"A. I have a camera in my car. I have two of them right now, and I take lots of pictures, and this was more occasion than usual to take pictures. I take a lot of pictures even if not related to any litigation.
"Q. Now it's my understanding from your testimony that the reason you were going to go back to her folk's house, to Helen McClintock's house, was because Carol asked you to tell her folks to stop by and see her that night?
"A. Yes.
"Q. That's the reason? That was the only reason you were going to go back there?
"A. Yes, it was. I would have no *excuse* to go otherwise. (Emphasis supplied.)
"Q. So you stopped, however, on the way from the hospital and took some pictures of the scene, not having been engaged, but just because you were interested?
"A. Well, I thought it would be a good precaution.
"Q. And then you stopped by her house; is that right?
"A. Well, I went home first and got my recorder.
"Q. To pick up your recorder?

"A. Yes.
"Q. You wanted to have your recorder with you when you went to see her mother and dad?
"A. Yes you never know what might happen.
"Q. Yet your only purpose in going there was to tell them that their daughter wanted to see them?
"A. Yes, that's true.
"Q. So you tucked the recorder under your coat just to deliver your message?
"A. Well, I never knew what might develop when I was over there."

Following his conversations with the McClintocks, appellant went to the home of Wanda Lou Holbert, then 18 years of age. Appellant did not know Wanda Lou Holbert other than seeing her face. (App. 78a) Wanda Lou had suffered a fractured pelvis, cracked ribs, and a head injury in the accident and had returned home from the hospital that day, February 13, 1974. (App. 120a-121a)

Appellant testified that he went to the Holbert home to interview her as a witness to the cause of the accident and not for the purpose of soliciting her as a client. (App. 58a) Mrs. McClintock testified that appellant went to see Wanda because "He was going to get her as a client. He would take both of them." (App. 48a)

Appellant upon being admitted to the home of Wanda engaged her in conversation at the front door and in the living room, and later at the kitchen table. The conversation between appellant and Wanda at the kitchen table was tape recorded by appellant. (App. 118a) Wanda did not know that appellant was tape recording their conversation. (App. 13a, Tr. 20-25) But Wanda testified that appellant's tape recording did not contain all of their conversation; that the first

conversation with appellant was at the front door when she admitted him and at that time he asked to represent her as her attorney.

"Mr. Ohralik stepped inside the house and told me who he was and that he was representing Miss McClintock as her attorney and that he had talked to her about the accident and that he would also like to talk to me about it and represent me as my attorney." (App. 13a, 14a, 21a)

During the course of the taped conversation with Wanda, appellant informed Wanda of the uninsured motorist provision of the insurance carried by Carol McClintock's parents and again offered to represent Wanda in her claim. Wanda said O.K. (App. 120a)

The following day, February 14, 1974, appellant telephoned Wanda Lou Holbert for the purpose of firming the attorney-client relationship begun the preceeding day. The phone was answered by Wanda's mother, Marie Holbert, a widow with 11 children, who unceremoniously advised appellant that his services were not desired. With respect to that phone conversation Mrs. Holbert testified:

> "Q. Can you tell the panel how that phone conversation came about?
> "A. Well, he called on the phone. He wanted to talk to Wanda. I said, "Well Wanda is not feeling too good. She is lying on the couch."
>
> He said, "I would like to talk to her about being her lawyer." I said, "Well I am sorry. We're not suing anybody." I said, "We have our own lawyer and we will get in touch with him."
>
> And he said, "Well Wanda is eighteen years old. She's her own boss and I would like to talk to her." I said, "I'm sorry. We talked it over and we don't want to sue nobody, and we don't want you as a lawyer."

> "Q. What did he say?
> "A. He says, "Well Wanda is eighteen. She is her own boss and she can talk for herself."
> "Q. Was that the end of the conversation?
> "A. No, he says that, "did you know you could sue McClintocks," and I said, "I don't have any intention of suing anyone." He said, "I saw an insurance policy that McClintocks have, and you can sue them for more money than you got," and I said, "I don't want to sue nobody."
> "Q. Was that the end of the conversation?
> "A. No. He said, "Well, Wanda gets to feeling better I would like for her to call me back." I said, "All right."
> "Q. Did you hang up then?
> "A. Yes, I did.
> "Q. Have you had any conversation with him since that time?
> "A. No, sir, I have not." (App. 23a-24a)

Wanda did not return appellant's telephone call nor did she respond to appellant's written request of February 28, 1974, for authorization to obtain her medical reports and for her to sign a written contract of employment. (App. 17a)

On March 14, 1974, Wanda wrote to appellant:

> "Mr. Ohralik;
>
> I do not wish to sue anyone so would you please contact anyone that you informed and tell them you are not my attorney, that is, if you have told anyone.
>
> Thank you." (App. 17a — Answer of Albert Ohralik to complaint of Wanda Lou Holbert. Rel. Ex. 1-l; TR 8-9)

Ignoring the oral and written notices that his services were not desired, appellant insisted that he had a valid binding agreement with Wanda and would not withdraw the notice he had given to the insurer of the

McClintock automobile that he was representing Wanda in her claim for medical payments and lost wages and compensation for her injuries.

Thereafter, in April 1974, Wanda Lou Holbert filed a complaint with the Grievance Committee of the Geauga County Bar Association alleging that appellant had solicited her case, that he was not her attorney although his notice to the insurance company claimed he was her attorney; that the insurance company was willing to pay for her injuries, but was unwilling to pay her because of the claim of appellant.

Appellant's answer to the complaint of Wanda demanded that Wanda pay him $2,466.66, and he would "disavow further interest and claim in her matter." (App. 26a-27a)

Wanda did not comply with appellant's demand.

At the hearing before the Board of Commissioners on January 29, 1976, appellant testified that he would abandon his claim against Wanda.

> "Q. Now how is the situation now of Wanda Holbert?
> "A. Well, I think I will have to abandon that because I think that the rules say that if a contract has its origin in a controversy, that an ethical question can arise; so I am going to abandon that." (Tr. 256)

Yet, on February 2, 1976, four days after appellant testified that he would abandon his claim against Wanda, he filed suit against her in the Chardon Municipal Court, Geauga County, Ohio, for $2,466.66, claiming a contract of employment. Appellant dismissed that suit with prejudice on January 27, 1977. (See Footnote 1, page 24)

Appellant sued Carol McClintock on her signed

agreement for value of services rendered and ultimately accepted a settlement of $4,166.66. Carol paid her second attorney $900.00 for his services in connection with the settlement negotiations with Mr. Ohralik and negotiations with the insurance company to settle for her personal injury claim. (App. 38a-42a)

After hearing on November 24, 1975, and January 29, 1976, the Board of Commissioners on Grievances and Discipline found that appellant did, in fact, solicit the personal injury cases of Carol McClintock, and Wanda Lou Holbert, in violation of DR 2-103(A) and DR 2-104(A), Ohio Code of Professional Responsibility.

The Board found appellant's defense, that the solicitation of business by an attorney is protected by the First and Fourteenth Amendments to the United States Constitution, to be without merit and overruled appellant's motion to dismiss. The Board recommended that appellant be publicly reprimanded. (J.S. 15a) Appellant was notified of the above findings of fact and recommendations of the Board on May 19, 1976, and on the same date a Show Cause Order was issued by the Court below, affording appellant the opportunity to object to the findings of fact and recommendation of the Board. (See Record of Proceedings below.)

Although not objecting to the findings of fact of the Board, appellant renewed his motion to dismiss these proceedings on the ground that DR 2-103(A) and DR 2-104(A) are unconstitutional for the reason that they deprive appellant of free speech as guaranteed by the United States and Ohio Constitutions.

Appellant's motion to dismiss the proceedings was overruled by the Court below September 17, 1976. (Ibid)

On October 18, 1976, appellant, by his Counsel, Walter S. Haffner, Cleveland, informed the court by letter that he did not desire to orally argue appellant's case before the court below, but desired to proceed on the briefs already submitted. He further informed the court by the same letter that he did not desire to orally argue the Motion to Stay Proceedings. (Ibid)

Upon review of the record made before the Board of Commissioners on Grievances and Discipline the Ohio Supreme Court found ample uncontroverted evidence supportive of the findings of the Board of Commissioners on Grievances and Discipline that appellant, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A), of the Ohio Code of Professional Responsibility, in soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent them in their respective claims for damages arising out of the accident of February 2, 1974.

It was the judgment of the Ohio Supreme Court that appellant, Albert Ohralik, be indefinitely suspended from the practice of law for those unethical violations of the Ohio Code of Professional Responsibility. (J.S. App. A 3a)

SUMMARY OF ARGUMENT

This case presents the issue of whether the application of DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility to appellant's in-person solicitation of his legal services violates his right of free speech under the First Amendment of the United States Constitution.

It is appellee's position that the constitutional principles raised and applied in *Bates v. State Bar of Arizona*, 433 U.S. . . , 97 S.Ct. 2691, 45 L.W. 4895

are dispositive of that issue and that the judgment of the Ohio Supreme Court should be affirmed.

In *Bates*, this court recognized that "the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary function of administering justice, and have historically been 'officers of the courts.' *Goldfarb v. Virginia State Bar* 421 U.S. at 792. More specifically controls over solicitation and advertising by attorneys have long been subject to State's oversight." 45 L.W. 4898.

The First Amendment overbreath doctrine does not apply to in-person solicitation of legal services of a lawyer. Therefore appellant must demonstrate that his specific conduct is protected.

In-person solicitation, particularly in the hospital room of a physically ill patient or immediately after a patient has been released from a hospital, breeds undue influence, overreaching, harassment, deception and misrepresentation and is conduct harmful to the client and such solicitation is not protected by the First Amendment. Such was the conduct of the appellant in this case. It was rightly condemned by the court below.

ARGUMENT

In *Bates v. State Bar of Arizona*, 433 U.S. . . . , 97 S.Ct 2691, 45 L.W. 4895, the Court considered the validity under the First Amendment of an Arizona disciplinary rule that regulated professional advertising by attorneys.

The issue before the Court was a narrow one. It was:

> Whether the State may prevent the publication in a newspaper of appellant's truthful advertise-

ment concerning the availability and terms of routine legal services.

The Court held:

> We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

In so ruling, however, the Court declined to apply the First Amendment overbreath doctrine to the challenged disciplinary rule, the Court stating:

> But the justification for the application of overbreath analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771 n.24, there are 'common sense differences' between commercial speech and other varieties. See also id., at 775-781 (concurring opinion). Since advertising is linked to commercial well-being it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See id. at 722-723 n. 24. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. Ibid. Since overbreath has been described by this Court as 'strong medicine' which 'has been employed sparingly and only as a last resort.' *Broadrick v. Oklahoma* 413 U.S. at 613, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. Cf. *Bigelow v. Virginia*, 421 U.S. at 817-818. 45 L.W. 4895-4903.

Accordingly, the constitutionality of the Arizona disciplinary rule was considered from the standpoint

of the "traditional" First Amendment rule, that is, "that the person making the attack demonstrate that in fact his specific conduct was protected." He "may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court." Ibid.

From the majority opinion in *Bates* we further deduce (1) that solicitation of professional employment is commercial speech; (2) that commercial speech is entitled to some First Amendment protection; (3) and that commercial speech which is false, misleading, deceptive, or otherwise evil is not entitled to First Amendment protection and may be restrained.

This case, then, does not present the constitutional issue of whether DR 2-103(A) or DR 2-104(A) are overbroad in First Amendment terms, but rather the narrow issue of whether the application of those rules to the conduct of appellant are violative of his First Amendment right of free speech.

The court below dismissed appellant's First Amendment claim, and, in effect, held that appellant's conduct was outside the scope of the First Amendment protection.

Although the court below did not make specific findings of fact of overreaching, misrepresentation, deception, conflict of interest or undue influence by appellant in his solicitation of the personal injury claims of the two young women in this case, the findings of fact by the court below and the record of this case show that elements of such conduct are present. It is the clear purpose of DR 2-103(A) and DR 2-104(A) to eliminate or at least reduce, to the greatest extent possible, the possibility that potential clients will be improperly influenced.

SOLICITATION OF PROFESSIONAL EMPLOYMENT THAT IS MARKED BY UNDUE INFLUENCE, OVERREACHING, DECEPTION, MISREPRESENTATION OR OTHER LIKE CONDUCT IS HARMFUL TO THE CLIENT AND NOT PROTECTED BY THE FIRST AMENDMENT.

The viewpoints of scholars on the subject of anti-solicitation rules of professional conduct such as those embodied in DR 2-103(A) and DR 2-104(A), here involved, are amply covered by the brief of appellant at pages 31-35. We do not intend to add to that list. However, as noted by appellant, the scholars and appellant agree that there are real evils that may result from in-person solicitation which the States are justified in restraining.

> One of the major charges against solicitation is that it may harm the client where the solicitation is marked by overreaching, overcharging or misrepresentation as to the legal services to be provided. And solicitation that is superimposed upon the physically or mentally ill patient or upon the accident victim unable to manage his legal affairs, obviously injures the best interests of such a client. Such injuries, where proved, serve to define specific types of solicitation that by any standard merit condemnation and professional sanctions. (Id. 32)

Since it is appellant's conduct that is here in question, we turn to an examination of that conduct as exemplified in the record.

Carol McClintock's Case

Carol McClintock and Wanda Lou Holbert were seriously injured in an automobile accident on February 2, 1974. Both were 18 years of age. Carol was

the driver and Wanda her passenger. The tortfeasor was uninsured. Carol's parents owned the automobile she was driving and carried uninsured motorist coverage.

Carol's personal injury claim was solicited by appellant in the hospital on February 13, 1974, eleven days after the accident. She had suffered two fractured legs and other injuries in the accident and was in traction at the time of appellant's visit. Carol did not employ appellant during that visit. However, she did employ him later that day by phoning her parents and telling them to tell appellant "to go to work on her case."

Appellant had proceeded from the hospital to the home of Carol's parents where he discussed with them their insurance coverage and the means Carol might employ to obtain compensation for her injuries. That discussion was secretly tape recorded by appellant by hiding his tape recorder under his coat. The transcript of that tape recording appears on page 92a of the Appendix.

Two days after his first visit, appellant returned to the hospital and obtained Carol's signature to a written contract employing appellant to represent her in her personal injury case. Carol was still in traction.

One month later, Carol was discharged from the hospital. She was in a body cast and needed a wheelchair to move about. (App. 33a)

Soon after her discharge from the hospital, Carol became dissatisfied with appellant's services, principally because she was unable to reach appellant by telephone to determine the status of her case, and discharged him. (App. 34a)

In the letter terminating appellant's services Carol stated that she was under the "influence of drugs"

when she agreed to employ him and was not sure she wanted him for her attorney. (App. 35a) In view of Carol's physical condition at the time she signed the contract of employment, this statement is probably the truth. It is not controverted in the record.

Whether or not Carol was "under the influence of drugs" when she employed appellant, her case points up the dangers of in-hospital solicitation to the patient-client who is unsophisticated in legal matters and vulnerable to the subtle persuasions of the sophisticated attorney. The dangers of undue influence in such a setting are real. An attorney who engages in in-hospital solicitation merits condemnation.

Furthermore, after his services were terminated, appellant sued Carol and the insurance company demanding one-third of any funds paid to Carol. That suit effectively prevented Carol from receiving any compensation from the insurance company. Carol settled that suit for $4,166.66, one-third of her compensation. (Tr. 141, App. 38a)

Wanda Lou Holbert's Case

Appellant solicited the case of Wanda Lou Holbert on February 13, 1974 in her home only a few hours after she had been released from the hospital.

The conversation between appellant and Wanda was secretly tape recorded by appellant by hiding his tape recorder under his raincoat. In the course of their conversation, appellant explained to Wanda that she had a compensable claim for her personal injuries, and offered to represent her. She said O.K. (App. 22a, 118a)

On the same day, after leaving Wanda, appellant wrote to the alleged tortfeasor that he represented her in her claim for compensatory damages.

The next morning, February 14, 1974, appellant phoned Wanda's home to confirm their relationship. This time, however, he talked to Wanda's mother who informed him in no uncertain terms that his services were not desired. (App. 23a-24a) Yet, with that knowledge, appellant on the same day wrote to the insurance adjuster for the insurer of Wanda's claim and told him that he represented Wanda; a clear misrepresentation of the fact. (See Answer of Albert Ohralik to Complaint of Wanda Lou Holbert. Rel. Ex. 1-g; TR 8-9)

Refusing to accept the notice that his services were not desired, appellant wrote to Wanda on February 28, 1974, requesting that she sign an enclosed contract of employment. She did not respond to that request. Two weeks later, on March 14, 1974, Wanda notified appellant by letter that he was not her attorney and requested that he so notify anyone he had otherwise informed. (App. 16a-17a) Appellant ignored her request, and let stand his previous notice to the insurance adjuster that he represented Wanda.

The insurer of the McClintock's automobile was willing to reimburse Wanda for her medical expenses, but withheld payment because of appellant's claim that he represented her. (App. 25a, 26a)

In April 1974, Wanda complained to the local bar association about appellant's conduct. But appellant continued to demand one-third of any compensation paid to Wanda for her injuries and threatened suit if he did not receive it. As proof of his claim of contract of employment with Wanda, appellant submitted to the bar association a copy of his secretly tape recorded conversation with Wanda on February 13, 1974. (Answer of Albert Ohralik to Complaint of Wanda Holbert — Rel. Ex. 1-a; TR 8-9) However, through the

intercessions of the local bar association grievance committee, appellant finally notified the insurer that he released his attorney claim only against funds that might be paid to Wanda under the medical pay coverage of the policy. (Answer of Albert Ohralik to Complaint of Wanda Lou Holbert, Rel. Ex. 1-n; TR 8-9)

In the hearing before the Board of Commissioners on Grievances and Discipline in the court below, appellant testified that he would abandon his claim against Wanda. (Tr. 256)

Although not a part of the record of the proceedings in the court below, nonetheless, it is a fact that four days after appellant made the above sworn statement that he would abandon his claim against Wanda, he filed suit against her demanding $2,466.66 under a contract of employment. That suit was dismissed with prejudice after notice of appeal to this Court was filed.[1]

In summary, this case is marked by undue influence in soliciting and obtaining an agreement from Carol McClintock to represent her in her claim when she was physically ill in the hospital. It is marked by deception and overreaching by appellant in soliciting and obtaining an agreement from Wanda Lou Holbert while secretly tape recording their conversation. The solicitation of Wanda is further marked by misrepresentation. Appellant knew on February 14, 1974 that his services were not desired by Wanda, yet on the same day he wrote the insurer's agent that he represented her. Appellant took no action to correct that

[1] The case is styled, Albert Ohralik v. Wanda Lou Holbert, et al, Case No. 76-CV-F66, Chardon Municipal Court, Geauga County, Ohio.

misrepresentation, but on the contrary continued to assert that he represented Wanda. His misrepresentation prevented Wanda from being reimbursed for her medical expenses at a time when she needed funds to pay her medical and hospital bills.

Is then appellant's conduct outside the scope of basic First Amendment protection? It is appellee's position that it is. The Court below properly exercised its responsibility to protect the public from such conduct.

CONCLUSION

The judgment of the Supreme Court of Ohio is correct and should be affirmed.

Respectfully submitted,

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The undersigned hereby certifies that three copies of the foregoing Brief of Appellee have been mailed by first class mail with postage prepaid to Eugene Gressman, Counsel for Appellant, 1828 L. Street N.W., Washington, D.C. 20036.

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FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 11 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

APPELLANT'S REPLY BRIEF

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1230

TABLE OF CONTENTS

	Page
I. Jurisdictional and due process principles preclude consideration of this case other than as conceived and resolved by the Ohio Supreme Court	2
(1) Effect on the jurisdiction of this Court	11
(2) Effect on appellant's right to appellate due process of law	13
II. The commercial free speech doctrine of the First Amendment protects acts of solicitation where there are no threats to public or client interests	17
(1) The purported distinctions between "advertising" and "solicitation"	20
(2) The historic similarity of "advertising" and "solicitation" as matters of etiquette	26
(3) The renewal of the practical objections to "solicitation" that were rejected in Bates as to "advertising"	27
Conclusion	30

TABLE OF AUTHORITIES

Cases:	Page
Bates v. Arizona State Bar, 433 U.S. ___, 97 S.Ct. 2691 (1977)	20, 23, 26, 28, 29
Bradley v. Fisher, 13 Wall. (80 U.S.) 335 (1872)	14
Brotherhood of Railroad Trainmen v. Virginia Bar, 337 U.S. 1 (1964)	17
Cardinale v. Louisiana, 394 U.S. 437 (1969)	11
Cohen v. California, 403 U.S. 15 (1971)	29
Cole v. Arkansas, 333 U.S. 196 (1948)	13, 15, 16
De Jonge v. Oregon, 299 U.S. 353 (1937)	13
Dewey v. Des Moines, 173 U.S. 193 (1899)	12
Edwards v. South Carolina, 372 U.S. 229 (1963)	12
Garner v. Louisiana, 368 U.S. 157 (1961)	12
Linmark Associates v. Willingboro, 431 U.S. 85 (1977)	26
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	17, 20, 21, 23

	Page
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	13
In re Oliver, 333 U.S. 257 (1948)	14
Randall v. Brigham, 7 Wall. (74 U.S.) 523 (1868)	14
In re Ruffalo, 390 U.S. 544 (1968)	14, 15, 16
Schneider v. Irvington, 308 U.S. 174 (1939)	21
State v. Rubin, 301 Wis. 30, 229 N.W. 36 (1930)	8
United Mine Workers v. Illinois State Bar Assn., 389 U.S. 217 (1967)	17
United States v. O'Brien, 391 U.S. 367 (1968)	23
United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)	18
Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976)	20, 25
Whitney v. California, 275 U.S. 357 (1927)	11

Statutes: Page

28 U.S.C. §1257(2) 10

Ohio Rev. Code Ann. §2933.58 14

Miscellaneous:

63 A.B.A.J. 1538 (1977) 2

American Constitutional Law §12-7, pp. 599-600 (1978) . . 22

Boulton, *Conduct and Etiquette at the Bar*, 6th ed., 1975 27

Christensen, *Lawyers for People of Moderate Means*, 136 (Amer. Bar Foundation, 1970) 26

Comment, *A Critical Analysis of Rules Against Solicitation*, 25 U.Chi.L.Rev. 674 (1958) 26

Crabites, *Our Magnificent Legal Ethics*, 1 Nat. Law. Guild Q. 186 (1938) 26

Gerety, *Redefining Privacy*, 12 Harv.Civ.Rts.Lib.L.Rev. 233 (1977) 29

Edward L. Wright, *The Canons of Professional Ethics*, an address before the National Conference on Law and Poverty, Conference Proceedings (Wash. D.C., June 23-25, 1965) 141 19

IN THE

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OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,
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OHIO STATE BAR ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

APPELLANT'S REPLY BRIEF

Appellant's reply brief is addressed to two major considerations that originate in the briefs filed by the three opposing bar groups:[1]

(1) Critical jurisdictional and due process issues emerge from the efforts of the Ohio brief and the California brief to transform this case from one of pure or benign solicitation into a stereotyped one of "ambulance chasing," replete with misrepresentations, overreaching, deception, and the like.

[1] The three briefs will be referred to herein as follows: (a) the Ohio brief, filed by the appellee Ohio State Bar Association; (b) the California brief, filed by the amicus State Bar of California; and (c) the ABA brief, filed by the amicus American Bar Association.

(2) The entitlement of an attorney's pure or benign solicitation of legal business to the protection of the First Amendment has been made evident by the utter vacuity of the "compelling state interests" that the ABA brief advances in support of the organized bar's total ban on such in-person solicitation.[2]

I

Jurisdictional and due process principles preclude consideration of this case other than as conceived and resolved by the Ohio Supreme Court.

The Ohio brief and the California brief have engaged in a totally impermissible effort to alter the nature of this case, both as it was decided below and as it has been presented to this Court. Ignoring the charges, the findings and the conclusions in the disciplinary proceedings against the appellant, those briefs have patently relitigated and reevaluated the facts of record, drawn their own findings and conclusions, and thereby convicted appellant of a host of malpractices never before alleged. In short, the appellant has never been given notice or an opportunity to defend against

---

[2] The ABA brief for the most part (but see footnote 6, *infra*) faithfully reflects the Ohio Supreme Court's treatment of this case as one of simple solicitation of two accident victims. It does not follow the lead of the Ohio and California briefs in trying to disfigure the charges, the findings and the conclusions respecting appellant's solicitation of Carol McClintock and Wanda Lou Holbert. But cf. 63 A.B.A.J. 1538 (1977), a "news item" describing the instant case as "an 'ambulance-chasing' situation in the purest sense, with the lawyer visting an accident victim as she recuperated in the hospital." The Journal item also asserted that "While *Bates* cracked the door for lawyers to promote themselves and their businesses, these new cases [the *Ohralik* and *Smith* cases] could burst it off its hinges."

the nine charges now leveled at him in these briefs – (1) invasion of privacy, (2) high-pressure salesmanship, (3) undue influence, (4) overreaching, (5) misleading and deceptive statements, (6) divided loyalties, (7) inadequate representation, (8) breaches of fiduciary duties, and (9) vindictiveness. Ohio brief, pp. 24-25; California brief, p. 75.

The seriousness of the jurisdictional and due process consequences of this radical transmutation cannot be ignored or understated. In effect, those two briefs are asking this Court to disregard the findings and conclusions that form the basis of the instant appeal and to render an advisory opinion as to the constitutionality of applying DR 2-103(A) and DR 2-104(A) to an entirely different set of findings and conclusions. Indeed, as the party appellee before this Court, the Ohio State Bar Association has framed in its brief (p. 1) a Question Presented that is quite inconsistent with the ensuing arguments, a Question Presented that in no way reflects any issue before this Court other than one involving a simple, benign solicitation:

> "Whether DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility are violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to discipline a lawyer for in-person solicitation of his legal services to persons injured in the same automobile accident who were, if anything, casual acquaintances."

Not one word in that version of the Question Presented suggests that the constitutionality of the DR provisions is to be resolved as if they had been applied to discipline a lawyer for in-person solicitation of two accident victims by the use of high-pressure salesmanship, misrepresentation, over-

reaching, divided loyalties, invasions of privacy, etc., etc., etc.

An appreciation of what has been attempted here must start with a recapitulation of what should have been obvious to the authors of the Ohio and California briefs – i.e., the charges, the findings and the conclusions reached by the Ohio disciplinary authorities. Those are the elements that ultimately define and confine the constitutional issue resolved by the Ohio Supreme Court, as well as the jurisdiction of this Court to consider the judgment rendered by the state court on that issue. And those are the elements that illuminate the critical due process problem that injects itself into this case if appellant's fate is now made to depend upon charges and findings as to which he has never had any notice or any opportunity to rebut.

To begin with, the appellant Ohralik was charged by the Board of Commissioners on Grievances and Discipline with the following misconduct only (App. 3a-4a):

> "On or about February 13, 1974, Respondent [Ohralik] learned that Carol McClintock and Wanda Lou Holbert of Chardon, Ohio, had been injured in an automobile accident. He then contacted Albert and Helen McClintock, the parents of Carol McClintock. Upon being informed that Carol McClintock was in the hospital, Respondent went to see her and advised her as to her legal rights. She thereupon employed Respondent to represent her as to her claims arising out of the accident.
>
> "On or about February 13, 1974, Respondent also went to the home of Wanda Lou Holbert and interviewed her regarding the accident. During such interview, Respondent advised Wanda Lou Holbert that she had a good claim for recovery for her injuries as a result of the accident and offered his services as an attorney to represent her. She thereupon employed Respondent.
>
> "Relator says that Respondent has violated DR 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility."

It is important to note that these charges contain not one syllable alleging the series of misconducts set forth in the Ohio and California briefs. There is no official charge, for example, that the appellant's solicitation conduct involved "dishonesty, fraud, deceit and misrepresentation" in violation of DR 1-102(A)(4). Nor is any charge leveled against appellant – as the Board of Commissioners was careful to explain (J.A.App. 14a) – "for his conduct in clinging to the contracts of employment obtained in the manner found above." Yet that latter charge, clothed in the language of "vindictiveness," has now been made in the California brief (pp. 74-75).

The appellant, in other words, was notified and given an opportunity to defend against a relatively simple charge of pure solicitation, composed of four basic elements: (1) a personal approach to two victims of an automobile accident; (2) a discussion with them of their legal rights and claims; (3) an offering of services as an attorney to represent them; and (4) his employment "thereupon" to represent each of the two solicited individuals. Those were the simple allegations that the complaint said amounted to violations of DR 2-103(A) and DR 2-104(A), violations which do not turn upon proof that the attorney has engaged in the other misconduct charged in the Ohio and California briefs. DR 2-103(A) and DR 2-104(A) concededly encompass the sim-

plest charges of pure solicitation, such as were here made. And it is out of that fact that the First Amendment claim arises.

The second stage in the recapitulation of the procedures below is found in the findings and conclusions reached by the trial body that heard and evaluated all the evidence, the Board of Commissioners acting through a Hearing Panel. That body exhibited the utmost fidelity to and respect for the simple and limited nature of the charges. At the outset of its findings (J.S.App. 11a), the Board noted that appellant had been charged with violations of the two disciplinary rules in that he had "solicited the Personal Injury cases of Carol McClintock and Wanda Lou Holbert." And in the ensuing discussion of the facts (J.S.App. 12a-14a), the Board made no reference whatever to the appellant having solicited in a manner involving invasions of privacy, high-pressure salesmanship, undue influence, overreaching, misleading and deceptive statements, divided loyalties, inadequate representation, breaches of fiduciary duties, or vindictiveness. And while appellant's main brief (pp. 10-14) has pointed out that some of the time sequences and other details in the Board's factual discussion are incorrect and misleading, such misstatements did not cause the Board to enlarge or go beyond the limited charge of having simply solicited two personal injury cases. Indeed, the Board's sole "FINDING OF FACT" is consistent only with this perceived limited charge; that finding bears repetition in full (J.S.App. 15a):

> "The evidence fully demonstrates that Respondent in seeking and obtaining agreements from Wanda Lou Holbert and Carol McClintock to represent them in their respective claims for damages arising from the accident of February 2, 1974,

> violated Disciplinary Rule 2-103A and 2-104A of the Code of Professional Responsibility. Respondent's defense that the solicitation of business by an attorney is protected by the First Amendment to the Federal Constitution is without merit. His Motion to Dismiss predicated on this ground was overruled."

It is significant that the report of the Board of Commissioners made no effort, with one exception, to assess the sufficiency or relevance of the testimony of Carol McClintock and Wanda Lou Holbert, and their respective mothers, from which the Ohio and California briefs now seek to extract proof of misrepresentation, overreaching, and the like.[3] Apparently the Board felt such testimony to be unworthy of belief and, even more so, to be quite irrelevant to the single charge before it. The Board was careful, however, to articulate the fact that appellant had not been charged with respect to "his conduct in clinging to the contracts of employment" and that, in any event, "there is insufficient evidence on which to base a finding that these activities, too, were violative of the Respondent's professional responsibili-

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[3] Neither the Ohio brief nor the California brief is content to rely upon the transcript or the record below in ascribing misconduct to the appellant. See, e.g., p. 24 of the Ohio brief: "Although not a part of the record of the proceedings in the court below, nonetheless, it is a fact that four days after appellant made the above sworn statement that he would abandon his claim against Wanda, he filed suit against her demanding $2,466.66 under a contract of employment." The California brief writers, who did not sit as the triers of fact and who were in no position to evaluate the credibility of witnesses, are excessively prone to make such non-record evaluations as appear at pp. 72-73 – i.e., that certain of Ohralik's statements introduced at the hearing were "patently false" and that he "may also have fabricated" certain of his other testimony at the hearing.

ties." J.S.App. 14a. That statement by the fact-finder completely undermines those portions of the Ohio brief (p. 24) and the California brief (pp. 46-51, 74) that try to manufacture charges and findings that the appellant was guilty of "vindictive" misconduct in "clinging to the contracts of employment."

It also bears repetition at this point that the report of the Board of Commissioners affirmatively found that (J.S.App. 14a):

> "Nor is there any evidence showing that Respondent's solicitation of Carol and Wanda Lou is part of an established or habitual course of conduct. Indeed, the only evidence of soliciting in the record is the pursuit of Wanda and Carol's causes."

This finding of a one-time solicitation venture is not without its own significance, for it has been judicially found that the "evils attendant upon solicitation are not apt to arise out of an occasional infraction of this canon of ethics by the lawyer." *State v. Rubin*, 201 Wis. 30, 32, 229 N.W. 36, 37 (1930).[4] These evils, added the Wisconsin court, "are more apt to appear when there is organized solicitation by men who are not members of the profession who may be tempted by their commercial zeal to stir up litigation and to attempt to create causes of action where none in reality exist." *Ibid.* But the immediate relevance of this

[4] While the Wisconsin court in the *Rubin* case said that it was unethical for a member of the bar to solicit business, "the court cannot say that three violations of this canon of ethics in a period of five years demonstrates that the offender is unfit to continue the practice of law." 201 Wis. at 32, 229 N.W. at 37. The court also noted that the referee in the disbarment proceedings had found "no proof in this case of dishonesty on his part in his relations with his [solicited] clients." 201 Wis. at 33, 229 N.W. at 38.

affirmative finding by the Board of Commissioners in the instant case is that it mirrors a careful and narrow reading of its own ultimate finding that the appellant did no more than solicit and obtain agreements from Carol McClintock and Wanda Lou Holbert.

The final step in the proceedings below, of course, was the review and adoption by the Supreme Court of Ohio of the limited finding of fact entered by the Board of Commissioners. Most of the Board's discussion of facts was repeated verbatim by the Supreme Court, a discussion which was addressed to a demonstration that the appellant did induce and solicit his representation of the two accident victims. And the court then made its critical determination (J.S.App. 4a, 48 Ohio St. at 220):

> "A review of the record before us reflects ample, uncontroverted evidence supportive of the finding of the Board of Commissioners on Greivances and Discipline that respondent, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A), set forth above, *in soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert* to represent each of them in their respective claims for damages arising out of the accident of February 2, 1974." [Emphasis added.]

Here again is patent the fact that DR 2-103(A) and DR 2-104(A) were found violated solely by reason of Albert Ohralik's acts "in soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert." There was no violation found or suggested by reason of soliciting and obtaining agreements in a deceitful, high-pressure or ambulance chasing manner; and indeed there could not be on the basis of the facts discussed in the court's opinion, for those facts

are utterly devoid of any indication of blatant misconduct in connection with the solicitations.

It was in light of that determination that solicitation *per se* is violative of DR 2-103(A) and DR 2-104(A) that the appellant raised his First Amendment challenge; and it was in light of that determination that the Ohio court rejected the challenge. Further reflecting that determination of a *per se* violation, the appellant invoked the appeal jurisdiction of this Court, under 28 U.S.C. §1257(2), to review the following Question Presented (J.S. 2-3):

> "Whether DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility are violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to suspend a lawyer indefinitely from the practice of law for having orally solicited his legal services on two occasions, there being no claim of misrepresentation, overreaching, fraud, or other activity on any public interest or on any interest of the clients."

Neither in its motion to dismiss the appeal nor in its brief on the merits has the appellee Ohio State Bar Association quarreled with that formulation of the Question Presented. As noted above, the appellee's brief on the merits (p. 1) contains a not dissimilar Question Presented, one that does not put in issue before this Court any consideration of the constitutional effect of applying DR 2-103(A) and DR 2-104(A) to solicitations accompanied by any or all of the nine types of misconduct now charged in the Ohio and California briefs.

Several profound effects flow from these attempts to alter the federal constitutional issue that was properly raised and then resolved by the Supreme Court of Ohio:

(1) **Effect on the jurisdiction of this Court.** It is axiomatic that the jurisdiction of this Court to review a final judgment of a state court is restricted in several ways by the nature of the federal constitutional issue that was decided by the state tribunal. Thus when a case reaches this Court, review is limited to the specific federal question or questions considered and passed upon by the state court. *Whitney v. California*, 274 U.S. 357, 362 (1927). Other federal questions that were not presented in and either expressly or necessarily decided by the state court are beyond the jurisdictional ken of the Court. That is true even though "there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature." *Ibid.* This Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

In other words, the Court lacks jurisdiction in this instance to consider the constitutionality of applying DR 2-103(A) and DR 2-104(A) to solicitations marked by such misconduct as misrepresentation, overreaching, inadequate representation, and the like. That simply was not the federal question raised or decided below; nor did the Ohio court have occasion to interpret or apply those Disciplinary Rules with reference to such malignant forms of solicitation. All that the court below determined was that DR 2-103(A) and DR 2-104(A), as interpreted and applied, operated to proscribe the mere acts of "soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert." And such benign acts, such *per se* violations of the Disciplinary Rules, were deemed to be without recourse to any First Amendment protections. That is the Ohio ruling that defines the metes and bounds of this Court's review jurisdiction. Indeed, were the last minute propositions advanced

in the Ohio and California briefs to be accepted as a basis for reviewing the Ohio judgment, this Court would be forced to render an advisory opinion on constitutional matters that were not considered or resolved by the Ohio court.[5]

It is no answer to say that the prevailing party below may advance in this Court different theories or arguments in support of the state court's judgment. See *Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899), holding that, where only one federal question has been raised in the state court, a party may not "come into this court from a state court and argue the question thus raised, and also another not connected with it, and which was not raised in any of the courts below, and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised." Thus to urge that there is no First Amendment bar to suspending an attorney who solicits by means of misrepresentation is not to support the judgment of the Ohio Supreme Court. That court's judgment simply did not encompass or treat with that contention or the facts supposedly surrounding the contention. No federal issue was involved other than the First Amendment consequences of disciplining an attorney for having solicited and obtained agreements from the two accident victims.

This Court has unquestioned power to "make an independent examination of the whole record," *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963), to assure itself that a state court's denial of a federal claim does not con-

[5] To the extent that the Ohio court may be said to have construed DR 2-103(A) and DR 2-104(A) to cover the type of solicitation here allged, this Court is bound by that interpretation. *Garner v. Louisiana*, 368 U.S. 157, 166 (1961).

stitute a forbidden intrusion on the principles of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). But this "constitutional fact" doctrine is equally unavailing as a jurisdictional crutch for reviewing the Ohio judgment as though it had determined the constitutionality of applying DR 2-103(A) and DR 2-104(A) to solicitations made in the context of misrepresentation and overreaching. The doctrine was never meant to serve as a means for uncovering additional facts that might have been used by the state court to resolve additional constitutional claims that might have been made. So to use the doctrine would significantly impair the historic relationship between this Court and the highest state courts, a relationship that limits this Court's reviewing power to the federal claims that were necessarily or expressly decided by the state courts.

(2) **Effect on appellant's right to appellate due process of law.** Not too surprisingly, the restructuring of the facts, the findings and the constitutional considerations, as sought by the Ohio and California briefs, would generate a massive problem of appellate due process. What those briefs are seeking is an affirmance by this Court of the Ohio suspension order upon charges that were never made, upon charges that the Ohio court never used in rejecting appellant's First Amendment claim. To affirm on that basis would involve this Court in precisely the kind of unfair process condemned in *Cole v. Arkansas*, 333 U.S. 196 (1948). And see *De Jonge v. Oregon*, 299 U.S. 353, 2[illegible] (1937).

No principle of procedural due process is more firmly established than that the entitlements of an individual – any individual – "to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a

right to his day in court – are basic to our system of jurisprudence." *In re Oliver*, 333 U.S. 257, 273 (1948). That is a principle fully applicable to attorneys accused of professional misconduct; indeed, in that precise context the principle has been described long ago as a "rule of natural justice." *Bradley v. Fisher*, 13 Wall. (80 U.S.) 335, 354 (1872). See also *Randall v. Brigham*, 7 Wall. (74 U.S.) 523, 540 (1868); *In re Ruffalo*, 390 U.S. 544, 550 (1968).

The appellant, of course, has been given no notice of any charges that he (1) invaded the privacy of Carol McClintock or Wanda Lou Holbert or their families, (2) engaged in high-pressure salesmanship, (3) used undue influence in obtaining retainer agreements from these two women, (4) engaged in some form of overreaching, (5) made misleading and deceptive statements, (6) involved himself in a situation of divided loyalties, (7) inadequately represented one or both of these clients, (8) breached his fiduciary duties to them, and (9) exhibited vindictive conduct or treatment of them.[6] Such charges, not having been made before the commencement of the disciplinary proceedings, cannot be added during or after those proceedings. That is the whole point of the *Ruffalo* decision, 390 U.S. at 551, which condemned the practice of amending disciplinary charges after the proceedings are underway "on the basis of the testimony of the accused" attorney. It must be considered even more objectionable to amend and add to the disciplinary charges – on the basis of the testimony adduced at the disciplinary proceedings – long after those proceedings have terminated and have reached this Court on appeal.

[6] To this list of late-blossoming charges must be added the assertion in the ABA brief (p. 20, n.6) that the appellant, in secretly recording conversations with a potential client, may have committed "a possible violation of the criminal law," i.e., Ohio Rev. Code Ann. §2933.58. Obviously, no such disciplinary or criminal charge was ever made against appellant in the proceedings below, and he was accorded no opportunity to defend himself against this cruel suggestion in the ABA brief. The disciplinary authorities were fully aware of these recordings, which were produced by the appellant only in defense against the single charge that he had solicited the two accident victims. See DR 4-101(C)(4), which permits an attorney to reveal the confidences or secrets of his client "to establish or collect a fee" or "to defend himself . . . against an accusation of wrongful conduct."

This Court, no more than any other appellate court, is simply not equipped to consider and resolve charges of professional misconduct never before made in the proceedings below. That is the very practical reason underyling the decision in *Cole v. Arkansas*, 333 U.S. at 202, that an accused individual is entitled to have the validity of his conviction "appraised on consideration of the case as it was tried and as the issues were determined in the trial court." There is just no way in which appellant – at this last stage in the appellate process – can marshal the facts and the evidence or produce other testimony or refute and rebut the nine or ten charges of misconduct now leveled at him.

The new charges, themselves, to say the least, are demeaning and degrading to the appellant's character and reputation. They are of the type that should never surface outside the controlled confines of a full due process proceeding, which cannot be provided at the appellate level. For that reason, appellant must refuse to follow the footsteps of the Ohio and California briefs, refuting and challenging each of their multitudinous allegations, assertions and suggestions of professional impropriety. This Court cannot and should not be a forum for resolving

such highly factual and highly controverted issues in the first instance. It matters not that these new charges are derived from the testimony already given at the hearing before the Board of Commissioners; to rely now on appellant's own testimony at that hearing to support these charges is to create the "trap" referred to in the *Ruffalo* case, 390 U.S. at 551 – the "trap" that appellant can now "be given no opportunity to expunge the earlier statements and start afresh."

Enough has been said to demonstrate the inappropriateness of the other suggestion in the California brief (p. 14) that this case be remanded to the Ohio Supreme Court to weigh "the strong public interests" to be served by suspending appellant from the practice of law. Those "strong public interests," of course, are precisely those which the Ohio and California briefs have asserted here for the first time.

It is intolerable to suggest that a remand is in order so as to give the Ohio Supreme Court a chance to consider an entire new set of professional misconduct charges. That court is no more equipped than this Court to shift the theory of the solicitation charge against appellant and to reassess his case on the basis of allegations that have never before been made, answered or resolved. The appellate due process doctrines enunciated in *Cole v. Arkansas, supra,* should be enough to demonstrate the unfairness and the impropriety of a remand under these circumstances.

The Ohio Supreme Court has resolved one critically important federal constitutional question: is a total and indiscriminate ban on solicitation, including in particular that which is not found to contain elements of misrepresentation, ambulance chasing and the like, consistent with the

values inherent in the First Amendment's commercial free speech doctrine? That is the question that must now be answered by this Court.

II

The commercial free speech doctrine of the First Amendment protects acts of solicitation where there are no threats to public or client interests.

At the heart of the constitutional problem posed in this appeal is the fact that this Court, in a series of cases of major importance, has held that the rules of professional ethics must give way to the First Amendment:

(1) *N.A.A.C.P. v. Button,* 371 U.S. 415, 429 (1963), which rejected the basic philosophy of DR 2-103(A) and DR 2-104(A) that solicitation "is wholly outside the area of freedoms protected by the First Amendment" and that the exercise of such freedoms can be foreclosed "by mere labels." The state, in other words, "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." 371 U.S. at 439.

(2) *Brotherhood of Railroad Trainmen v. Virginia Bar,* 337 U.S. 1 (1964), where First Amendment protection was extended to a union's legal services plan whereby substantially all of the members' personal injury claims were solicited and channeled, on a private fee basis, to lawyers selected and touted by the union. The Court there noted that "lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." 337 U.S. at 8.

(3) *United Mine Workers v. Illinois State Bar Assn.,* 389 U.S. 217, 223 (1967), which rejected any notion that the First Amendment protections accorded solicitation in the *Button* case were limited to the solicitation of litigation in-

volving "political matters of acute social moment." Protected solicitation may also involve the solicitation of personal injury cases.

(4) *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971), which noted that the "common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." But even though the *United Transportation* case, like the other three, arose in the context of organizational-type solicitation, in each case the Court found that the individual attorneys who directly benefited from the organizational solicitation were also protected from the imposition of professional sanctions. Thus in the *United Transportation* case, where private practitioners were retained by union members who had been directly solicited by union investigators, the Court gave no suggestion that the lawyers who knowingly participated in the collective solicitation program were any less protected by the First Amendment than the organization itself.

Those four decisions have profoundly affected the organized bar's gradual realization that its canons and codes of professional responsibility cannot be insulated from the pervasive impact of the First Amendment and of other cherished constitutional provisions. It is no longer enough to brush aside First Amendment claims with an impassioned plea that the profession must protect its public image by a rigid enforcement of its disciplinary rules. As has been said by Edward L. Wright, at a time when he was Chairman of the A.B.A. Special Committee for Evaluation of

Ethical Standards and engaged in drafting the present Code of Professional Responsibility,[7]

> "Our canons of ethics are for the most part relevant to an earlier era. However undesirable the practices they condemn, they do not profoundly affect the social order outside our own group. . . .
>
> "In the past 5 years all the lawyers in this room have been acutely conscious of the series of opinions of the Supreme Court of the United States which have profoundly affected the practice of law as such. Specifically, we may address ourselves, as a committee, to the *Button* case, to the *Brotherhood* case, to the *Estes* case. No one in the American Bar Association has ever thought that the canons of ethics should be enshrined as constitutional principles. . . . Our committee is acutely conscious that any recommendations that it makes must be in the light of existing constitutional decisions and existing social conditions."

And so we turn to the justifications offered by the organized bar, as expressed in the ABA brief filed in this case, for resisting the intrusion of the First Amendment into its Disciplinary Rules designed to outlaw all forms of in-person solicitation by individual attorneys, unrelated to any kind of protected organizational activity. These justifications must, of course, be assessed against the principles developed by this Court in the above-mentioned organizational cases,

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[7] Edward L. Wright, *The Canons of Professional Ethics*, an address before the National Conference on Law and Poverty, Conference Proceedings (Wash. D.C., June 23-25, 1965) 141 at 143.

augmented by the principles subsequently developed in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976), and in last term's ruling in *Bates v. Arizona State Bar*, 433 U.S. ___, 97 S.Ct. 2691 (1977). More specifically, the asserted justifications must be tested in light of the *Button* ruling, 371 U.S. at 438, that with respect to the bar's solicitation rules "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." And it bears repetition that *Button* also held that solicitation is not "wholly outside the area of freedoms protected by the First Amendment." 371 U.S. at 429.

(1) **The purported distinctions between "advertising" and "solicitation."** The ABA brief (pp. 3–6) begins with a studied effort to distinguish the "advertising" involved in *Bates* from the "solicitation" involved in the instant appeal. Solicitation, it is said, is more private in nature, less susceptible to meaningful regulation, and thus has a greater potential for abuse.

That there are differences between advertising and soliciting is a self-evident proposition. But it does not follow that the hand is to be constitutionally preferred to the mouth. The differences that obviously exist between written and oral communication have never been deemed to be of particular importance in the constitutional sense, warranting more stringent restrictions on the freedom to speak freely. It is far too late in the day to suggest that the constitutional values adhering to the freedom to write – or the freedom of the press – are at a higher level than the values associated with the right to speak freely, in private or in public. Both types of freedom have long been deemed to lie in equal parts "at the foundation of free government by

free men." *Schneider v. Irvington*, 308 U.S. 147, 161 (1939).

Thus the complaint that oral solicitation is more unregulable and therefore more likely to be abused can hardly serve as a constitutional excuse or as a compelling state interest justifying a total ban. What was said in *Bates* with respect to a similar argument advanced against opening the door to lawyers' written advertising is equally applicable here:

> "It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: they will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latters' interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust." Slip opinion, p. 27.

And if the enforcement of reasonable rules against illicit forms of solicitation is more difficult than the enforcement of similar rules respecting improper advertisements, so be it. As the *Button* case holds, the First Amendment insists that the state and the organized bar accommodate themselves to the fact that some forms of solicitation lie within the ambit of protected freedom. No amount of difficulty in de-

tecting what lies outside that ambit justifies a proscription of what lies within. That difficulty, if it be one, is part of the price of freedom.

Equally unavailing is the additional suggestion of the ABA brief (p. 4) that commercial solicitation involves more "conduct" than "speech" and thus may warrant "somewhat less" First Amendment protection than the kind of newspaper advertising involved in *Bates*. As has been said in a recent authoritative study, Tribe, *American Constitutional Law* §12-7, pp. 599-600 (1978):

> "The trouble with the distinction between speech and conduct is that it has no real content. All communication except perhaps that of the extrasensory variety involves conduct. Moreover, if the expression involves talk, it may be noisy; if written, it may become litter. So too, much conduct is expressive, a fact the Court has had no trouble recognizing in a wide variety of circumstances. Expression and conduct, message and medium, are thus inextricably tied together in all communicative behavior; expressive behavior is '100% action and 100% expression.' It is thus not surprising that the Supreme Court has never articulated a basis for its distinction; it could not do so, with the result that any particular course of conduct may be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit."

The ABA brief (p. 5) has shown no lack of ingenuity in hanging oral solicitation on the "conduct" or "nonspeech" peg by identifying such elements as (1) personally approaching prospective clients, (2) employing agents to contact such

clients, and (3) entering into retainer agreements.[8] What is forgotten, however, is that these physical acts of walking toward a prospective client and signing a retainer agreement are quite subsidiary to what is said between the attorney and client. Certainly the ABA's concern with solicitation goes beyond the signing of a retainer agreement, the lifeblood of most lawyers; and certainly the ABA must be concerned with something other than the ability of a lawyer to walk in a straight line toward a prospective client. The real concern, of course, relates to what is said or communicated, particularly if what the attorney says is deceitful or wrong or misleading or overreaching in character. What the ABA and the Disciplinary Codes are really interested in, therefore, is suppressing free expression by the attorney, whether that expression be considered licit or illicit. Even if we accept the "speech-conduct" dichotomy, at least where both elements are combined in the same course of conduct, *United States v. O'Brien*, 391 U.S. 367, 377 (1968), teaches that governmental intrusion is impermissible unless the governmental interest "is unrelated to the suppression of free expression." Add to that lesson the reminder that *Button* advises that some kinds of solicitation do involve protected free expression. Thus the very primacy of the bar's interest in suppressing the protected along with the unprotected forms of expression renders illegitimate the "speech-conduct" justification for outlawing all forms of solicitation.

The ABA brief (pp. 5-6) also complains that, while advertising may serve "societal interests in assuring informed

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[8] With equal assurance, one could say that the preparation of a *Bates*-type lawyer's advertisement involves such "nonspeech" elements as (1) typing out the advertisment, (2) transporting it to the newspaper office, and (3) setting the advertisement in type.

and rational decision-making," soliciting merely emphasizes persuasion, cajoling and expedition of decision-making. And soliciting is said to discourage consumers from engaging in a critical "comparison" of the availability and prices of legal services, and to fail to "significantly increase the flow of information to potential consumers." But constitutionally speaking, the right to speak freely in a commercial context does not depend upon the degree of persuasivenss or the extent of the flow of information. Moreover, this suggestion confuses the free speech right of the soliciting lawyer with the potential client's interest in receiving adequate information and making informed decisions. That right and that interest are not necessarily coterminous; and certainly the consumer's lack of adequate information cannot justify cutting off the attorney's First Amendment right to articulate whatever information he may have to offer.

It may be conceded that in-person solicitation is not the ideal way for an injured person to select an attorney. But neither is an advertisement in a daily newspaper. Yet even after admitting that advertising does not provide a complete foundation on which to choose an attorney, this Court in *Bates* held that:

> ". . . it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative – the prohibition of advertising – serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in

> ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. See *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S., at 769-770. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." Slip opinion, pp. 22-23.

The same might be said of denying the consumer some of the relevant information and legal advice that a soliciting attorney might convey to them.

Moreover, to the extent that solicitation can be carried out in the constitutional manner assumed by the *Button* decision, the absolute ban imposed by DR 2-103(A) and DR 2-104(A) creates serious questions whether it "leave[s] open ample alternative channels for communication." *Virginia Pharmacy Board*, 425 U.S. at 771. If the accident victim is too injured to read a newspaper or a telephone directory or other lawyer listing, what options does he have if he cannot expect a visit from an honest soliciting attorney, ready and able to explain the victim's legal problems? Does the ABA expect him to remain vulnerable to the insurance adjusters, the hospital "runners" or the ill-informed advice of his lay friends?

In sum, DR 2-103(A) and DR 2-104(A) make no attempt to regulate the time, the place or the manner of the soliciting lawyer's speech. Cf. *Linmark Associates v. Willingboro*, 431 U.S. 85, 93 (1977). They simply ban all soliciting, even that which constitutes First Amendment speech. And the ABA has suggested no constitutional way to affirm such a ban.

(2) **The historic similarity of "advertising" and "solicitation" as matters of etiquette.** At this point it is appropriate to recall this Court's observation in *Bates* that "the ban on advertising originated as a rule of etiquette and not a rule of ethics" (slip opinion, p. 19). That same observation can be made about the organized bar's proscription of solicitation. This historic phenomenon has been frequently observed, and by no less than the American Bar Foundation. A report of that organization has said:[9]

> ". . . advertising and solicitation are very different from most of the activities covered by the profession's ethical rules. While there are those who regard advertising and solicitation as inherently evil—even in their customary commercial and business applications—most people would reject the idea that such activities by themselves involve moral turpitude or venality. Indeed, even when engaged in by lawyers and against the profession's ethical rules, advertising and solicitation activities are quite different from disloyalty to clients, misappropriations of client's funds, violation of client confidences, or perpetration of fraud upon clients or the courts. Henry S. Drinker made this point in his esteemed work on legal ethics, characterizing the profession's restrictions on advertising and solicitation as rules of professional 'etiquette' rather than professional 'ethics.'"

[9] Christensen, *Lawyers for People of Moderate Means* 136 (Amer. Bar Foundation, 1970). For incisive critiques of the organized bar's dislike of solicitation, see Comment, *A Critical Analysis of Rules Against Solicitation*, 25 U.Chi.L.Rev. 674 (1958); Crabites, *Our Maleficient Legal Ethics*, 1 Nat. Law. Guild Q. 186 (1938).

The ban on solicitation, in other words, has come to the American bar from the rules of etiquette of the English inns of court.[10] Solicitation has accordingly become known as contrary to the traditions and amenities of an honorable profession in America and an honorable legal club in Britain. And precisely because it is a matter of etiquette and grace, rather than *malum in se*, the rules against solicitation and the prospects of regulating rather than banning solicitation are somewhat uncertain. Much of what the ABA brief fears about opening the door to solicitation reflects the natural uneasiness of trying to regulate some of the social and professional graces expected of the legal profession.

(3) **The renewal of the practical objections to "solicitation" that were rejected in Bates as to "advertising."** With slight variations, each of the asserted objections in the ABA brief (pp. 6-16) to lifting any part of the ban on solicitation is a rerun of the objections raised as to lifting the total advertising ban, and thus rejected by the *Bates* decision. Here, of course, the objections are

[10] To this day, the ban on solicitation by British barristers is contained in a pamphlet entitled *Conduct and Etiquette at the Bar*, 6th ed., 1975, written by Sir. William Boulton of the Inner Temple.

clothed in the rubric of "important and legitimate state interests" that justify continuing the total ban on all forms of individual in-person solicitation. But those objections should fare no better than they did in *Bates*.

It is said, for example, that "most types" of personal solicitation initiated by lawyers "would not be susceptible to effective state regulations to prevent individuals from being misled or coerced." ABA brief, p. 7. Consumers are said to be less able to resist the entreaties of the soliciting lawyers who seek them out and to be more vulnerable to overreaching and undue influence. ABA brief, pp. 8-9. And the potential clients are allegedly more prone to heed the soliciting lawyers' appeals to emotions (fear, greed and revenge) as grounds for retaining their services, and thus to retain the first lawyer who approaches them. ABA brief, p. 9.

Precisely the same complaints could have been leveled against the types of organizational solicitation that were accorded First Amendment protection in the *Button-Brotherhood-United Mine Workers-United Transportation* line of cases; yet none of the consequences here feared seem to have ensued in those contexts. More importantly, the narrow issue presented by this appeal does not permit their legitimate First Amendment solicitation rights will mislead or appeal solely to the emotions of the prospective clients. As the *Bates* decision stated with respect to the organized bar's fear that opening the advertising door would flood the market with unscrupulous lawyer-advertisers, "most lawyers will behave as they always have. . . . For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward." Slip opinion, p. 27.

The ABA brief (pp. 12-14) also fears that solicitation will somehow invade the privacy of the persons solicited, and that lawyers will be crowded around hospital doors, calling and visiting prospective clients. This claim is somewhat ironical, coming from a profession that prides itself in digging out the facts and obtaining and preserving the confidences and secrets of clients, thereby forcing the clients to bare whatever privacy they may have with respect to the relevant. DR 4-101.

But with respect to the assertion of First Amendment rights, which is the only kind of solicitation here involved, the expression of ideas cannot be shut off to protect unwilling viewers or hearers without "a showing that substantial privacy interests are being invaded in an essentially intolerable manner," since any "broader view . . . would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*, 403 U.S. 15, 21 (1971). And most assuredly, harms that exist only in the eye or mind of a voluntary beholder, such as the ABA, cannot justify restricting otherwise protected activity. See Gerety, *Redefining Privacy*, 12 Harv.Civ.Rts.Lib.L.Rev. 233, 277 (1977). In short, in assessing the First Amendment right of an attorney to engage in solicitation, we cannot assume that they will overreach the boundaries of that right and invade someone else's privacy or other protected interest. The burden of showing that such is likely or bound to happen is not met by the speculations of a brief writer.

The *Bates* decision has effectively demolished the last concern of the ABA brief (pp. 15-16) that solicitation may adversely affect the nature and quality of services which are thereafter rendered. Restraints on advertising, said the *Bates* decision, "are an ineffective way of

deterring shoddy work," and an attorney "who is inclined to cut quality will do so regardless of the rule on advertising." Slip opinion, p. 26. No reason appears why such comments are inapplicable to restraints on solicitation.

CONCLUSION

For these reasons, supplementing those in appellant's main brief, the judgment of the Supreme Court of Ohio should be reversed.

Basically at stake here is the efficacy of EC 1-1 of Canon 1 of the Code of Professional Responsibility: "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer."

Because appellant tried to provide legal advice to his acquaintances when asked, because he offered them competent legal services when he saw they were in need, and yet becuase he engaged in no deceit or misrepresentation or overreaching, he stands convicted of solicitation *per se*. What a shoddy and cruel way to treat a member of the bar who has done no more than follow the basic tenet of EC 1-1.

Respectfully submitted,

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January 11, 1978

FOR ARGUMENT

Supreme Court, U. S.
FILED
DEC 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

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TABLE OF CONTENTS

PAGE

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Advertising Of The Type Considered In *Bates* Differs In Fundamental Ways From Conduct Ordinarily Regarded As "Solicitation" 3

II. Although No State Prohibits All Forms Of Direct Solicitation Of Clients, Limitations On This Practice Are Justified By Important And Legitimate State Interests 6

A. By Their Very Nature, Most Types Of Personal Contacts Initiated By Lawyers Or Their Agents With Potential Clients Would Not Be Susceptible To Effective State Regulation To Prevent Individuals From Being Misled or Coerced 7

B. Contacts Initiated By Lawyers Or Their Agents With Potential Consumers Of Legal Services Would Interfere With The Privacy Of The Persons Solicited 12

C. Solicitation May Adversely Affect The Nature And Quality Of Services Which Are Thereafter Rendered, By Compromising The Attorney's Independent Judgment 15

PAGE

III. The Decision Below Should Be Affirmed Since Appellant Was Found To Have Violated Rules Which Are Supported By Legitimate State Interests And Which Are Necessary For Protection Of Those Interests 16

A. Since Ohio's Prohibition Against Commercial Solicitation Is A Reasonable Means Of Preventing Conduct Likely In Most Instances To Endanger State Interests, The Prohibition Should Be Sustained Even Though It May Inhibit Some Unobjectionable Conduct 16

B. Even If The Rules At Issue Were Deemed Broader Than Necessary To Attain Their Objectives, Appellant Should Not Be Permitted To Challenge These Rules Under The First Amendment Since Appellant's Own Conduct Could Properly Have Been Prohibited 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

PAGE

Bates v. *State Bar of Arizona*, 433 U.S. _____, 97 S.Ct. 2691 (1977) 2, 3–4, 5, 7, 8, 11–12, 15–16, 21, 23

Board of Governors v. *Agnew*, 329 U.S. 441 (1947) 20

Breard v. *Alexandria*, 341 U.S. 622 (1951) 13, 20

Brotherhood of Railroad Trainmen v. *Virginia State Bar*, 377 U.S. 1 (1964) 6

Buckley v. *Valeo*, 424 U.S. 1 (1976) 17, 20

Civil Service Comm'n v. *Letter Carriers*, 413 U.S. 548 (1973) 17–18, 20

Cohen v. *Hurley*, 366 U.S. 117 (1961) 15

Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949) 5

Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 7

Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) 13

N.A.A.C.P. v. *Button*, 371 U.S. 415 (1963) 6

NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969) 5

Packer Corporation v. *Utah*, 285 U.S. 105 (1932). 13

Paris Adult Theatre I v. *Slaton*, 413 U.S. 49 (1973) 5

Rowan v. *Post Office Dept.*, 397 U.S. 728 (1970) .. 12–13

United Mine Workers v. *Illinois State Bar*, 389 U.S. 217 (1967) 6

PAGE

United States v. *O'Brien*, 391 U.S. 367 (1968) 4

United Transportation Union v. *State Bar of Michigan*, 401 U.S. 576 (1971) 6

Other Authorities

DR2-103 and DR2-104 of the Ohio Code of Professional Responsibility 2

Hatch Act, 5 U.S.C. §7324 17

Ohio Rev. Code Ann. §2933.58 20

Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22934 (1972) .. 7–8

Securities Act of 1933, 15 U.S.C. §77e 18

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INTEREST OF AMICUS CURIAE

The American Bar Association is a voluntary association whose membership is open to the members of the bar of the States, territories and possessions of the United States. It is the largest organization of the legal profession in the United States, having more than 200,000 members. One of the most important purposes of the ABA is the development and recommendation of professional standards, and in this regard, the ABA has promulgated a model Code of Profes-

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*This Brief is filed with the consent of all parties pursuant to Rule 42 of the Court.

sional Responsibility as a recommendation to courts and governmental agencies. The interest of the ABA in this case is predicated upon its commitment to the position that the States must be given ample latitude to develop regulations that are effective to control the problems presented by client solicitation. DR2-103(A) and DR2-104(A) of the Ohio Code of Professional Responsibility, under which appellant was disciplined, are modeled on similarly numbered provisions of the Code recommended by the ABA at the time those provisions of the Ohio Code were adopted, and although the ABA Code has been subsequently amended, those amendments would not have affected the result here.[1]

SUMMARY OF ARGUMENT

While "advertising" and "solicitation" are not precise terms, public advertising of the kind upheld in *Bates* v. *State Bar of Arizona*, 433 U.S. ___, 97 S.Ct. 2691 (1977) differs in fundamental ways from the type of conduct ordinarily regarded as solicitation. The former utilizes public channels of communication and is not addressed to particular individuals, while the latter generally implies a direct, personal contact in order to persuade a potential client to hire a particular attorney for a specific purpose. Solicitation, by its nature, could not be as effectively regulated or monitored as public advertising, and, to the extent that its emphasis would be to persuade and to expedite decision-making, solicitation might well serve to discourage consumers from engaging in a critical comparison of objective information.

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[1] In August, 1977, the ABA House of Delegates amended DR2-103(A) and DR2-104(A) of the ABA Code so that the prohibition against solicitation would not apply to forms of public advertising that would be allowed under the amended provisions of DR2-101.

Since "solicitation" does not have a precise meaning, the term is generally avoided in State ethical rules, and the States instead proscribe particular forms of conduct posing the greatest dangers of abuse. To the extent that limitations are placed on unsolicited contacts with potential clients, however, those limitations serve important State interests. Solicitation would pose the danger that subtle forms of coercion and undue influence could be brought to bear to encourage unsophisticated persons to hire particular attorneys, but, unlike public advertising, solicitation would not be susceptible to regulation that would channel it into the most meaningful forms. The States may legitimately be concerned with these and certain other problems associated with direct solicitation, including the intrusion that unsolicited contacts would represent into the privacy of potential clients and the effect of this practice on the attorney's exercise of independent judgment.

Since the Ohio rules are not broader than necessary to protect legitimate State interests and since there is no dispute that appellant violated such rules, the decision below should be affirmed without regard to the allegedly "harmless" nature of appellant's particular conduct. In any event, appellant should not be permitted to challenge rules for which he was disciplined as being overbroad since his own conduct gives rise to legitimate State concerns.

ARGUMENT

I. Advertising Of The Type Considered In *Bates* Differs In Fundamental Ways From Conduct Ordinarily Regarded As "Solicitation."

In *Bates*, the Court emphasized that the constitutional issue was "only whether the State may prevent the publica-

tion in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services." 97 S.Ct. at 2709. Recognizing, however, that certain forms of "solicitation" might present different constitutional considerations, the Court specifically declined to rule on that issue. 97 S.Ct. at 2700, 2709.

Advertising of the type upheld in *Bates* utilizes public channels of communication, is visible to State regulatory authorities, and makes no representation and offers no inducement to specific individuals regarding claims that they might assert. While labels are not precise, "solicitation" generally refers to an entirely different type of conduct, ordinarily implying a direct, personal contact by a lawyer or his agent with an individual whom the lawyer hopes to persuade to hire him for a specific purpose. Solicitation, being private, is less susceptible to meaningful regulation by State authorities than public advertising and thus has a greater potential for abuse.

These differences between advertising and solicitation are significant to the First Amendment issues presented by this case. First, to the extent that commercial solicitation could be regarded as "conduct" rather than "speech," it may warrant somewhat less First Amendment protection than newspaper advertising of the kind involved in *Bates*. Even in the context of political or ideological expression, the Court has held that:

> "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

Since solicitation involves personally approaching prospective clients, employing agents to contact prospective clients, or entering into contracts of retainer, it comprises "nonspeech" elements that are not a part of public advertising. Numerous other examples can be cited of communications that are generally regarded as conduct for purposes of governmental regulation, including offers to sell securities, price information exchanges between competitors, and employers' threats of retaliation for employees' labor actions. *See, Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61–62 (1973); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 497–503, (1949). As Mr. Justice Black explained in *Giboney*, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 336 U.S. at 502.

In addition to possessing "nonspeech" elements that are missing from public advertising, solicitation also less directly serves—indeed may subvert—the societal interests identified in *Bates* as warranting the extension of First Amendment protection to certain types of professional advertising. As the Court recognized in *Bates*, certain commercial advertising is deserving of some constitutional protection because it may serve important "societal interests in assuring informed and rational decision-making." 97 S.Ct. at 2699. However, the emphasis of solicitation is to persuade, to cajole, and to expedite decision-making. It is likely to discourage consumers from engaging in a critical *comparison* of the "availability, nature, and prices" of services, which the Court recognized in *Bates* "performs an indispensable role in the allocation of resources in a free enterprise system." 97 S.Ct. at 2699. Moreover, given the availability of regulated

advertising as a means of fulfilling the public's interest in "informed and rational decision-making" regarding legal services, it is unlikely that solicitation would significantly increase the flow of information to potential consumers.

II. Although No State Prohibits All Forms Of Direct Solicitation Of Clients, Limitations On This Practice Are Justified By Important And Legitimate State Interests.

The term "solicitation" is avoided in the ethical rules adopted in most States, including the provisions of the Ohio Code of Professional Responsibility under which appellant was disciplined. Instead, the States seek to proscribe particular forms of conduct which pose the greatest dangers of abuse.

No State bans *all* unsolicited contacts with potential consumers of legal services. While the provisions are not directly involved here, the Ohio Code contains important exceptions to the general prohibition against unsolicited contacts, so as not to interfere with the functioning of legal services organizations satisfying the conditions of DR2-103(D) and so as not to interfere with First Amendment rights of association. *See, N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar*, 389 U.S. 217 (1967); and *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576 (1971).

In assessing the constitutionality of the particular restrictions on solicitation challenged by appellant, it is especially important that the public's interest in the legitimate objectives of the State regulatory scheme be fully considered. Appellant stresses his own "entitlement to the protection of the First Amendment in his daily chores" (Brief for

Appellant, at 37), while in *Bates*, the Court emphasized the public's interest in receiving product and service information rather than the advertiser's interest in disseminating his economic message. Lawyers are granted licenses to practice by the States and hold positions of special trust and obligation, and numerous restrictions circumscribe their conduct in the public interest. As the Court recognized in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975), "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" State limitations on direct solicitation of clients, while obviously preventing certain individual practitioners from being able to approach potential clients for private financial gain, serve important and legitimate State interests.

A. By Their Very Nature, Most Types Of Personal Contacts Initiated By Lawyers Or Their Agents With Potential Clients Would Not Be Susceptible To Effective State Regulation To Prevent Individuals From Being Misled or Coerced.

Wholly apart from the obvious abuses which have long been recognized to be inherent in door-to-door sales of ordinary consumer products,[2] the direct solicitation of clients by

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[2]The Federal Trade Commission has recognized the many types of abuses and problems that are inherent in direct home solicitation or door-to-door sales. Many of the most common abuses are documented in the report issued by the FTC after conducting hearings on this subject in 1972, including deception by salesmen in getting inside the door, high pressure tactics, misrepresentation as to the quality, price, or characteristics of the product, high prices for low quality merchandise, and the nuisance created

(footnote continued on next page)

lawyers or their agents would also create the potential for more subtle and more intractable forms of deception and undue influence.

In contrast to the consumer of more familiar products and services, the consumer of legal services is likely to know little about the nature of services that would be appropriate to his needs or to be able to compare the quality of services that are offered by different practitioners. The Court recognized in *Bates* that the public's lack of sophistication concerning legal services poses special problems of deception. 97 S.Ct. at 2709.

Confusion or lack of knowledge about legal services not only would make consumers susceptible to being misled by soliciting attorneys or their agents but also would make them more vulnerable to overreaching and undue influence. The danger would not be limited to use of overt forms of

by the visit to the home by the uninvited salesmen. Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22934, 22937 (1972).

Since home solicitation of customers frequently precludes any comparative shopping and results in uninformed purchases, the FTC concluded that excessive prices are "commonplace". *Id.* at 22939. As the National Consumer Law Center explained in its Statement, quoted in the FTC's report, "The door to door selling technique strips from the consumer one of the fundamentals in his role as an informed purchaser, the decision as to when, where, and how he will present himself to the marketplace." *Id.* at 22939, n.44. If such problems are presented by these attempts to sell simple consumer products, the problems would be greatly magnified in the context of solicitation by lawyers offering complex services about which the consumer is likely to have little information. Moreover, solicitation by lawyers poses unique dangers because the persons most likely to be the targets of solicitation, such as accident victims, members of a decedent's family, and persons charged with crimes, are particularly vulnerable to high pressure tactics and deception.

coercion by unscrupulous practitioners, such as refusing to terminate an unsolicited call on a prospective client or repeatedly contacting a prospective client who after previous communications expressed no interest. Nor would the danger be limited to situations where the person solicited was distraught or otherwise unable to think clearly, such as at the hospital room, the accident site, or the funeral parlor.

Disparity in knowledge about the services being sold would more generally give rise to the potential for undue influence whenever a lawyer sought directly to persuade a consumer to purchase his services. Because an individual would rarely have a basis for doubting a lawyer's representations as to his rights and liabilities, potential consumers of legal services may well be less able to resist the entreaties made through unsolicited contacts by lawyers than the entreaties of salesmen who seek them out to sell them more familiar products and services.

Moreover, the purchase of legal services, by the very nature of such services, could be encouraged through appeals to emotions that would not, in combination, animate the purchase of other types of services including fear, greed, and the desire for revenge. For example, without any overreaching or direct coercion, a lawyer could prey upon the individual's fear of going to prison in a criminal case or his fear of losing his home and other possessions in a civil proceeding to induce the lawyer's retention by a potential defendant.

Inducements used in direct solicitation would likely result in numerous instances in which consumers would retain the first lawyers who approached them, as did the two young women solicited by appellant.[3] Few clients would thereafter

[3] *Amici Curiae* Public Citizen and the National Resource Center for Consumers of Legal Services speculate at p. 27 of their Brief

(footnote continued on next page)

be willing to risk discharging the lawyers who had been hired, even if they were dissatisfied or changed their minds about taking the actions recommended, for fear of becoming involved in a legal dispute with a lawyer. Appellant's lawsuits for fees against the clients solicited provides a pointed illustration of the reasons why persons would generally be fearful of discharging lawyers whom they had retained. To the extent that removal of restrictions on solicitation would result in consumers' simply retaining the first lawyers by whom they were approached, solicitation would plainly frustrate rather than serve the overriding public interest in facilitating the free and informed selection of counsel.[4]

The dangers of deception and undue influence posed by solicitation would be far less susceptible to effective State regulation than are the problems presented by public adver-

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that direct solicitation might encourage competition among lawyers and that if the practice were allowed, the women solicited by appellant might subsequently have been approached by a lawyer willing to handle their cases for one-quarter rather than one-third of their recovery. However, one-on-one contacts of this kind would seem far more likely to discourage competition since in many instances the unsophisticated consumer would have no basis for determining the reasonableness of the offer being made and could be persuaded to accept the offer without first examining advertised fees or consulting knowledgeable persons to ascertain its reasonableness. Indeed, in this case, a second lawyer's offer to handle the clients' cases for less than appellant would probably have come too late. In instances such as this, where the client could be represented on a contingent fee basis, the danger would be particularly acute that the first lawyer to approach the client would be able to persuade the client to retain him, since, without misrepresentation, it could be made to appear that the lawyer's services would cost the client nothing.

'Solicitation would pose a special danger of thwarting the free and informed selection of counsel in those instances where the soliciting lawyer could put pressure on prospective clients by reason of other relationships with those individuals.

tising which similarly result from lack of sophistication about legal services. In *Bates*, the Court suggested, that with respect to public advertising such problems could be controlled by the States, in part, through regulations limiting its contents. The Court explained that "[t]he only services that lend themselves to advertising are the routine ones . . .", and even with respect to advertisements concerning such services, the Court refused to "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required. . . ." 97 S.Ct. at 2703, 2709. Similarly, the Court observed that claims of quality "are not susceptible to measurement or verification" and "may be so likely to be misleading as to warrant restriction." 97 S.Ct. at 2709.

To some extent, the States can thus channel *public* advertising of legal services into forms most likely to result in "informed and rational decisionmaking" and least susceptible to consumer confusion and misapprehension, if not outright deception. Since such advertising leaves a record of the communication and is highly visible, attorneys themselves are likely to limit the contents of their advertising to accurate and informative announcements of the kinds permitted.

By contrast, solicitation, being private and spontaneous, is not susceptible to regulation of the type suggested for public advertising in *Bates*. Communications which mislead, confuse, deceive, coerce, or overreach would not come to the attention of State regulatory authorities unless the individual solicited registered a complaint. In many instances, the clients themselves would be unaware that they had been the victims of such practices and could not be expected to alert State authorities. Nor, unlike public advertising, would the communications be subject to continual scrutiny by State authorities and consumer protection organizations. It would

be indeed anomalous for the States to enforce particularized regulations covering public advertising, as suggested in *Bates*, by limiting such advertising to routine services, by requiring publication of necessary disclaimers, and by restricting claims as to quality, while at the same time permitting direct solicitation, for which a comparable regulatory scheme would be utterly impractical.

B. Contacts Initiated By Lawyers Or Their Agents With Potential Consumers Of Legal Services Would Interfere With The Privacy Of The Persons Solicited.

Unlike commercial advertising through public channels of communication, unsolicited and direct contacts by lawyers or their agents with potential clients would necessarily be obtrusive and would in many instances interfere with the privacy of the persons solicited. The Court's decision in *Bates* along with recent developments in the States removing restrictions on certain forms of public communications by lawyers afford the public increasing opportunity to learn about the availability of legal services without subjecting individuals to the harassment and intrusion resulting from direct, personal, and unsolicited contacts.

The Court has previously recognized that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 736 (1970). Accordingly, greater protection under the First Amendment has traditionally been afforded those communications which leave the intended recipients free to ignore the communications if they choose. As the Court observed in *Rowan*, "[n]othing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit", nor does anyone have the

"right to press even 'good' ideas on an unwilling recipient." 397 U.S. at 737–38. *See also Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974); *Packer Corporation* v. *Utah*, 285 U.S. 105, 110 (1932). *Cf.*, *Breard* v. *Alexandria*, 341 U.S. 622 (1951), where the Court upheld against challenges based on the First and Fourteenth Amendments a city ordinance prohibiting direct home solicitation for the sale of goods without the prior consent of the occupant.

Direct, personal and unsolicited communications with consumers would not provide them "choice or volition" to receive the communications. *See Lehman, supra*; *Packer Corporation, supra*. In many cases, consumers who would be most in need of legal services would be those who would consider unsolicited contacts by lawyers or their agents the greatest intrusion on their privacy. For example, a decedent's family or the victim of a publicized accident may well prefer to seek counsel through personal contacts, the recommendation of friends, lawyer referral services, newspaper advertisements, or directories than to be subjected to a barrage of direct and unsolicited communications. Similarly, the family of a person who has been arrested may find unsolicited contacts by lawyers to be annoying and embarrassing and may be better able to find counsel for a relative being held through the sources mentioned above or through legal assistance organizations.

Moreover, there are numerous instances in which individuals who are aware that they have claims that could be asserted choose not to do so. The assertion of claims, through litigation or otherwise, ordinarily imposes substantial financial and emotional burdens on the person asserting the claim and may expose him to unwanted public attention and embarrassment. Efforts to persuade reluctant litigants to assert

potential claims could deny such individuals the anonymity to which they should be entitled.

Given the advantage that the first lawyer to contact a prospective client would have, it is reasonable to assume that lawyers engaging in commercial solicitation would have every incentive to seek out potential clients as soon after their claims or needs arose as possible. The resulting "race" to the client might well prompt solicitation at the very times when it would be most offensive.

Finally, even those unsolicited contacts which by themselves were inoffensive and unobjectionable might *cumulatively* encroach upon the individual's right to be let alone. If one lawyer had a constitutionally protected right to solicit, all lawyers would have the same right. In instances where persons potentially in need of legal services could be readily identified, removal of restrictions on solicitation would likely result in a great many calls and visits by soliciting attorneys or their agents. For example, some law offices might instruct clerical personnel to telephone the next of kin of persons listed in newspaper obituaries for purposes of soliciting representation of the estate.

Unlike door-to-door salesmen of ordinary consumer products, soliciting attorneys would interject themselves into some of the most private and personal concerns that individuals have. Protecting persons from harassment by those seeking to encourage them to retain particular lawyers and to take particular actions is a legitimate interest served by rules limiting direct and unsolicited communications with potential consumers of legal services.

C. Solicitation May Adversely Affect The Nature And Quality Of Services Which Are Thereafter Rendered, By Compromising The Attorney's Independent Judgment.

When an attorney's representation follows from his having given unrequested advice to a layman, the lawyer's independent judgment may well be affected by his having persuaded the client to purchase his services. For example, a lawyer who personally appealed to victims of an alleged violation of law to represent them in an action against the alleged wrongdoer would almost certainly be hesitant later to advise his clients that their claims were not meritorious, even if his knowledge of the facts as developed in litigation so indicated. Similarly, a lawyer who solicited a client by means of preliminary and uninformed representations as to the scope of the project to be undertaken might be reluctant to perform all necessary services even if more extensive work was warranted, for fear of being accused of employing bait and switch tactics. This general concern was recognized in *Cohen* v. *Hurley*, 366 U.S. 117, 124 (1961), where the Court noted that forms of solicitation may be "inconsistent with the personally disinterested position a lawyer should maintain."

As a part of his obligation to maintain a personally disinterested position, it has always been understood that a lawyer should not encourage individuals to take particular actions primarily for the private benefit of the attorney. To the extent that limitations on commercial solicitation prevent lawyers from "stirring up" litigation, they serve the same ends as prohibitions against barratry. The social policies underlying the traditional proscription of barratry must obviously be reconciled with the need to increase the public's awareness of legal rights and remedies. *Cf.*, *Bates*, 97

S.Ct. at 2705. While a lawsuit is certainly not "an evil in itself" (*Bates*, 97 S.Ct. at 2705, n.32), it is nevertheless clear that no social purpose is served when lawyers interject themselves into controversies, incite the parties, and thereby bring to litigation disputes which would otherwise have been resolved by the parties alone. The States are certainly entitled to consider these problems in formulating regulations controlling unsolicited contacts by lawyers or their intermediaries with potential clients.

III. The Decision Below Should Be Affirmed Since Appellant Was Found To Have Violated Rules Which Are Supported By Legitimate State Interests And Which Are Necessary For Protection Of Those Interests.

Appellant argues, in substance, that although a need exists for some State regulation of commercial solicitation, the Ohio rule at issue is overly broad. Appellant also attempts to argue that his conduct was wholly unobjectionable. In the first place, the record plainly demonstrates that appellant's conduct poses precisely the dangers which support the Ohio rule against solicitation. More importantly, even if in some conceivable situations the rules challenged by appellant could be deemed overbroad, appellant should not be permitted to avail himself of the "overbreadth" doctrine to secure reversal of the decision.

A. Since Ohio's Prohibition Against Commercial Solicitation Is A Reasonable Means Of Preventing Conduct Likely In Most Instances To Endanger State Interests, The Prohibition Should Be Sustained Even Though It May Inhibit Some Unobjectionable Conduct.

Effective regulation of commercial practices frequently requires prophylactic rules that operate before the fact to

prevent conduct that poses the danger of abuse in a high number of instances. Such regulatory schemes should not be vulnerable to First Amendment challenge merely because they can conceivably bar some unobjectionable forms of conduct.

Even in the context of political or ideological speech, the Court has previously sustained broad prophylactic rules that generally support important State interests, even though they serve to prohibit some harmless practices as well. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), for example, the Court upheld statutory limitations on political contributions on the theory that they were necessary "to limit the actuality and appearance of corruption resulting from large individual financial contributions." 424 U.S. at 26. Appellants in that case argued that not every large contribution would result in these abuses, and they pointed out that "proven and suspected quid pro quo arrangements" could be dealt with by the "less restrictive means" of bribery laws and narrowly drawn disclosure requirements. 424 U.S. at 27. The Court, however, observed that these remedies would be effective to control "only the most blatant and specific attempts of those with money to influence governmental action" and accordingly held that the legislature could properly determine that broader preventive measures were warranted. 424 U.S. at 28.

Similarly, in *Civil Service Comm'n* v. *Letter Carriers*, 413 U.S. 548 (1973), the Court sustained the constitutionality of the Hatch Act, 5 U.S.C. §7324(a)(2), which bars federal employees from taking "an active part in political management or in political campaigns" on the theory that employment and advancement in government service should not depend upon political performance. The Court noted that "[i]t may be urged that prohibitions against coercion are sufficient protection." 413 U.S. at 566. However, it recognized that the

First Amendment did not require that the problem of coercion be treated after the fact through narrowly drawn regulations. The Court held that the decision to adopt instead a broad prophylactic rule was properly made by the Congress and the Executive. 413 U.S. at 566.

Where regulations pertain to commercial practices rather than ideological speech, it is even more important that the States be permitted to adopt preventive measures that are necessary for protection of the public. While it may be desirable for forms of ideological speech of questionable legality to go unpunished and undeterred so as to avoid inhibiting legitimate expression, the public's interest in tolerating marginally dangerous conduct differs radically where commercial practices are at issue.

Regulations adopted by the Securities and Exchange Commission provide only one example of a regulatory scheme that imposes broad limitations on practices that in certain instances may threaten important governmental interests. A person who sold unregistered securities in violation of the Securities Act of 1933, 15 U.S.C. §77e, could properly be punished, even if he engaged in no deception, misrepresentation, or other specific abuse.

State regulations prohibiting commercial solicitation are thus not unique in barring a type of conduct, that, although in some instances likely to be harmless, would also in many cases result in abuses that the State may legitimately seek to prevent from occurring. Appellant repeatedly suggests that through narrower regulations directed at specific abuses the State of Ohio could have controlled the most harmful practices associated with solicitation while at the same time permitting his own allegedly unobjectionable conduct.[5] Appellant's argument, however, ignores the State's legitimate interest in having regulations which are effective and objective, which are self-enforcing, and which are practicable to police.

These criteria of practicability would plainly not be satisfied by a regulatory system which sought to evaluate instances of direct solicitation on a case by case basis, in order to determine after the fact whether there had been deception, undue influence, or related abuses mentioned by appellant. As noted above, most forms of solicitation would be largely shielded from public scrutiny, and wrongdoing would come to the attention of State authorities only as a result of client complaints. Apart from the reluctance of clients to become entangled in disagreements with their lawyers, the approach necessitated by narrower rules would also be inadequate because large numbers of consumers would never realize that they had been the victims of improper inducements. Unlike public advertising, solicitation could not be subject to continual and independent scrutiny by State authorities, consumer groups, and other members of the general public.

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[5]In support of his attack on Ohio's "blanket" prohibition against solicitation, appellant argues that narrower regulations would be adequate and refers to a set of proposed changes to the ABA Code, denominated as "Proposal B," which the ABA has distributed for public consideration. Appellant asserts that he would not have been charged with wrongdoing if Proposal B had been adopted in Ohio. While provisions similar to those of Proposal B have not been adopted or interpreted by any State, appellant's actions would seem to be contrary to DR2-103(A) of Proposal B. Moreover, contrary to the implication made in appellant's Brief, the only ethical rules recommended by the ABA for adoption by courts and governmental agencies are those contained in the current ABA Code. The ABA House of Delegates in August, 1977 decided to approve the alternative amendments to Canon 2 now incorporated into the ABA Code rather than Proposal B.

In those instances in which State authorities learned of possible abuses in the solicitation of clients, proof of wrongdoing would be extremely difficult. Conversations would rarely be recorded,* and proof of deception or undue influence would depend entirely upon the recollection of the clients solicited. Subtle nuances in statements made by the persons engaged in the solicitation would frequently be of great importance, and the testimony of unsophisticated witnesses regarding such nuances would rarely be sufficient to warrant disciplinary action, except in the most outrageous cases.

Moreover, it would be impossible through narrower regulations for the States to protect the privacy of a citizen against the intrusion caused by a large number of unsolicited contacts, even though one of those alone would not necessarily be offensive or objectionable.

The First Amendment does not require that the States follow the subjective, after the fact approach urged by appellant. As a legislative matter, the States should be permitted to determine whether commercial solicitation would present problems in a sufficient number of instances to warrant the imposition of preventive measures. *See, Buckley, supra; Letter Carriers, supra; Breard, supra; Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947).

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*Appellant recorded one of his conversations with one of the two women whom he solicited, apparently in an effort to evidence his contract of retainer. However, it could not be expected that those who anticipated that their practices would be called into question would routinely record such conversations. Furthermore, to record a conversation with a potential client without advising the client of the recording, as appellant did, would invade the client's privacy and, at least in Ohio, raise a question of a possible violation of the criminal law. *See* Ohio Rev. Code Ann. §2933.58.

B. Even If The Rules At Issue Were Deemed Broader Than Necessary To Attain Their Objectives, Appellant Should Not Be Permitted To Challenge These Rules Under The First Amendment Since Appellant's Own Conduct Could Properly Have Been Prohibited.

Even assuming *arguendo* that the rules which appellant was found to have violated were broader than necessary to protect State interests, appellant should not be permitted to invoke the overbreadth doctrine to challenge these rules.

The overbreadth approach has been employed at times in the First Amendment context to permit attacks on overly broad statutes without requiring the person making the attack to demonstrate that his specific conduct was protected. The reason for the rule is to avoid chilling constitutionally protected speech. However, in *Bates*, the Court held that "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context" and accordingly declined "to apply it to professional advertising, a context where it is not necessary to further its intended objective." 97 S.Ct. at 2708. The Court explained that "[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." 97 S.Ct. at 2707. Since solicitation is a practice similarly "linked to commercial well-being," and, at the same time, is a practice certainly no more deserving of First Amendment protection than commercial advertising, it follows from *Bates* that overbreadth should not be applied to State limitations on solicitation.

Appellant has failed to demonstrate that the specific practices for which he was disciplined were deserving of First Amendment protection. Even a cursory review of the facts of

this case reveals conduct plainly illustrating certain of the social concerns which underlie State prohibitions against most forms of solicitation.

Appellant's unsolicited contacts with the two accident victims occurred under circumstances likely to result in confusion and misunderstanding or to breed undue influence. One young woman was approached in her hospital room, while the other was contacted at her mother's home only hours after being released from the hospital. An approach under these circumstances bespeaks undue influence. The accident victim thus contacted would rarely be fully resistant to proposals made by direct solicitation and would be strongly disinclined to compare the services offered by the soliciting lawyer with other available alternatives.

Since appellant's conversation with Carol McClintock was not recorded, it is impossible to ascertain with certainty the representations that he made to her in her hospital room to persuade her to retain him. However, the conversation with Wanda Lou Holbert was recorded, and review of the transcript of that recording reveals that the client was unsophisticated about legal services, that she was very quickly and easily persuaded to consent to representation by appellant, and that her consent was, in all likelihood, given without any understanding of the available alternatives. The transcript further indicates that after securing her consent appellant employed a variety of inducements to encourage his potential client to fulfill the agreement made at the outset of their conversation.

Such practices plainly frustrate the free and informed selection of counsel by persons in need of legal services. The facts of this case clearly illustrate ways in which the first lawyer to approach unsophisticated persons can obtain their uninformed consent to represent them.

Appellant's contacts with these women also represented an intrusion into their privacy. If, as appellant urges here, restrictions on such solicitation were removed, appellant would undoubtedly have been only one of numerous attorneys who would have hurried to the bedside of each victim. Wholly apart from the other interests served by limitations on solicitation, the preservation of the privacy of accident victims would alone be sufficient justification for prohibiting unsolicited contacts of this sort.

CONCLUSION

The present case should not be decided without regard for the probable effects of *Bates*. Forms of public advertising such as newspaper announcements, consumer directories and other communications are likely to become increasingly common sources of consumer information. Although appellant seeks to extend the rationale of *Bates* to his situation, solicitation by lawyers is wholly different from public advertising. Indeed, to permit solicitation is to subvert the very values served by objective informative advertising.

Unlike proper advertising, solicitation is essentially conduct, the purpose of which is to persuade a consumer of legal services to hire a particular lawyer and not to engage in a critical comparison of advertised information from a number of lawyers. Viewed in this light, to permit solicitation is to undercut rather than follow *Bates*. The dangers of in-person selling have been long recognized by consumerists and others, and those dangers are particularly acute in the case of legal services. Moreover, solicitation by lawyers may also compromise the independent judgment of the soliciting lawyer and constitute a substantial invasion of privacy of potential clients.

The ABA respectfully suggests that sound public policy supports the decision made by Ohio to prohibit solicitation such as that engaged in by appellant. In any event, the States should be given sufficient latitude under the First Amendment to regulate such commercial practices. Under these circumstances, the judgment of the Supreme Court of Ohio should be affirmed.

December 21, 1977

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MOTION FILED
NOV 18 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

No. 77-56

IN THE MATTER OF EDNA SMITH,

Appellant.

MOTION FOR LEAVE TO FILE
AND
BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND THE NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES URGING THE COURT TO SET ASIDE THE DISCIPLINARY ORDERS BELOW

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*	vii
INTEREST OF *AMICI*	vii
BRIEF OF *AMICI CURIAE*	1
INTRODUCTION	2
CONSTITUTIONAL AND ETHICAL PROVISIONS INVOLVED	2
QUESTION PRESENTED	4
STATEMENT OF THE CASES	5
A. STATEMENT OF FACTS IN NO. 76-1650	5
B. STATEMENT OF FACTS IN NO. 77-56	10
SUMMARY OF ARGUMENT	16
ARGUMENT	18
I. THE PRESENT SOLICITATION RULES ARE SERIOUSLY IN NEED OF MODIFICATION	18
II. THE SOLICITATION RULES UNDER WHICH APPELLANTS WERE DISCIPLINED VIOLATE THE FIRST AMENDMENT	22
A. FIRST AMENDMENT PROTECTIONS APPLY TO COMMUNICATIONS THAT ARE NOW PROHIBITED	22

Page

B. CONSUMERS HAVE A SUBSTANTIAL INTEREST IN RECEIVING INFORMATION CONCERNING THEIR PARTICULAR RIGHTS THAT GREATLY OUTWEIGHS ANY INTEREST THAT THE BAR HAS IN SUPPRESSING ALL SOLICITATIONS 26

C. MANY NARROWLY DRAWN, LESS RESTRICTIVE ALTERNATIVES ARE AVAILABLE TO GUARD AGAINST ANY ABUSES THAT MIGHT RESULT FROM SOLICITATION . . . 32

III. THE CONDUCT OF EACH APPELLANT IS PROTECTED BY THE FIRST AMENDMENT . . . 36

CONCLUSION 38

TABLE OF AUTHORITIES

Cases:

Bates v. State Bar of Arizona,
45 U.S.L.W. 4895 (U.S. June 27, 1977) . . . . . *passim*

Bigelow v. Virginia,
421 U.S. 809 (1975) 26

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 17, 25

Brotherhood of R. Trainmen v. Virginia,
377 U.S. 1 (1964) 29

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 28

Doe v. Pierce,
No. 74-475 (D.S.C. 1974) 12, 13, 15

Page

Dunn v. Blumstein,
405 U.S. 330 (1972) 16, 24-25

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) 20

Kleindienst v. Mandel,
408 U.S. 753 (1972) 22

Lamont v. Postmaster General,
381 U.S. 301 (1965) 16, 22, 24

Linmark Associates, Inc. v. Willingboro,
431 U.S. 85 (1977) 23

Martin v. Struthers,
319 U.S. 141 (1943) 22

NAACP v. Button,
371 U.S. 415 (1963) 16, 17, 24, 29, 33, 37

Patterson Drug Company v. Kingery,
305 F. Supp. 821 (W.D.Va. 1969) (three-judge court) . . 22

Shelton v. Tucker,
364 U.S. 479 (1960) 16-17, 25

In Re Solomen Cohn, New York Law Journal,
Feb. 19, 1974, p. 2, cols. 6-7 . . . . . 18, 19

Stanley v. Georgia,
394 U.S. 557 (1969) 22

Talley v. California,
362 U.S. 60 (1960) 17, 25

United Mine Workers v. Illinois Bar Ass'n.,
389 U.S. 217 (1967) 29

Page

United States v. O'Brien, 391 U.S. 367 (1968) 25

United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) 28-29

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) . 22, 23, 24, 33

Constitutional and Ethical Provisions:

United States Constitution:

First Amendment . . . . . *passim*

Code of Professional Responsibility:

Canon 2 . . . . . 18, 36

Canon 5 27

Ethical Considerations:

EC 2-1 19
EC 2-2 . . . . . 19, 33
EC 2-3 20
EC 2-4 20
EC 2-16 20
EC 2-25 20
EC 2-27 27
EC 8-1 20
EC 8-2 20
EC 8-3 20

Disciplinary Rules:

DR 2-103 2
DR 2-103(A) 2, 5, 8

Page

DR 2-103(D) 2, 10, 13, 29
DR 2-103(D)(5)(a)-(d) 2-3, 29
DR 2-104 . . . . . 4, 32, 33
DR 2-104(A) 4, 5, 8, 10, 13
DR 2-104(A)(1) 4, 32, 33
DR 2-106 27

Other Authorities:

Freedman, Monroe H., *Lawyers' Ethics In An Adversary System*, Bobbs-Merrill (1975) 19

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MOTION OF PUBLIC CITIZEN AND THE NATIONAL RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* URGING THE COURT TO SET ASIDE THE DISCIPLINARY ORDERS BELOW

Public Citizen and the National Resource Center for Consumers of Legal Services hereby move the Court for leave to file the accompanying brief *amici curiae* urging the Court to set aside the disciplinary orders entered below in the above-entitled actions.

INTERESTS OF *AMICI*

Amici are two broad based consumer-oriented organizations whose interests will be directly affected by the disposition of the present proceedings. Each *amicus* has a

significant organizational interest in improving the quality, availability and delivery of legal services, and each represents the interests that its individual members and supporters have in obtaining important information about the lawyers who are available to represent them. Moreover, *amici* are the two organizations that this Court granted leave to file a prior *amicus* brief urging plenary consideration of the present appeals in tandem.

Public Citizen is a non-profit organization supported by contributions from approximately 65,000 individuals annually. It engages in a wide variety of activities on behalf of consumers and is particularly concerned about laws and ethical restrictions that govern the price and quality of professional services as well as the dissemination of information about those services, especially as they relate to lawyers. Attorneys for Public Citizen represented the consumer plaintiffs in successful suits challenging the validity of lawyers' minimum fee schedules[1] and challenging the constitutionality of statutory prohibitions on drug price advertising.[2] In addition, Public Citizen has attempted to publish its own consumers' directory of physicians but has been forced by low physician participation to commence litigation challenging on First Amendment grounds the constitutionality of an advertising restriction that prohibits doctors from being listed in such directories.[3] Public Citizen has also submitted *amicus* briefs in the cases of *Jacoby v. State Bar of California*, No. LA 30601 (Cal. Sup. Ct., May 3, 1977),

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[1] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

[2] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

[3] *Public Citizen v. Commission on Medical Discipline of Maryland*, No. 76-1944 (4th Cir., appeal pending).

and *Bates v. State Bar of Arizona*, 45 U.S.L.W. 4895 (U.S. June 27, 1977), both of which held that consumers have a right of access, protected by the First Amendment, to certain information about attorneys and their practices.

The National Resource Center for Consumers of Legal Services (the "Resource Center") is a non-profit organization funded by foundations and by its members, which include labor unions, cooperatives, credit unions, and other consumer groups. The Resource Center represents more than 27,000,000 individual consumers of legal services throughout the United States. A principal purpose of the Resource Center is to foster the growth and development of legal service delivery plans for low and middle income persons and to provide assistance to individuals and organizations that wish to establish such plans. Because the successful establishment and operation of these plans depends upon the ability of attorneys to disseminate information about their practices to consumers, the Resource Center is committed to improving the flow of such information. The Resource Center also participated *amicus curiae* in the *Jacoby* and *Bates* cases.

The interests presented by *amici* in this case are the interests of consumers in having meaningful access to information enabling them to determine when legal services may be useful, and allowing them to make informed choices among available lawyers and delivery systems. The informational interests of consumers are not identical to the interests of attorneys in disseminating information about their practices, but both interests are similar; consumers cannot secure meaningful access to information about attorneys if the attorneys are prevented from effectively disseminating that information. In fact, Last Term in *Bates*, the

majority opinion "deem[ed] it significant" that consumer organizations supported the elimination of the advertising ban struck down in that case. Slip Op. at 26 n.35, 45 U.S. L.W. at 4902. Consequently, presentation of the consumer interests will assist the Court in making an informed decision concerning the proper disposition of the present appeals.[4]

Respectfully submitted,

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[4]Although *amici* sought the consent of the parties to the filing of this brief, they were able to obtain consents from only three of the four parties involved. Consequently, *amici* have made the present motion.

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INTERESTS OF *AMICI CURIAE*

The interests of amici are set out in the accompanying motion for leave to file this brief *amici curiae.*

INTRODUCTION

Appellants in the two present actions are attorneys who have been disciplined for violating state prohibitions on solicitation which mirrored the prohibitions contained in the American Bar Association's Code of Professional Responsibility. Those provisions not only prohibit attorneys from urging individuals to employ them, but also prohibit attorneys from accepting employment by individuals whom they have advised of their legal rights. Because the effect of those prohibitions is to impede the flow of potentially useful information from lawyers to consumers, the prohibitions must be measured against the standards that this Court has announced in similar kinds of First Amendment cases, most notably *Bates v. State Bar of Arizona*, 45 U.S.L.W. 4895 (U.S. June 27, 1977). Since neither the Ohio nor South Carolina Supreme Courts applied the proper standards or made any findings of a real or potential harm to the public from the conduct for which appellants were disciplined, the decisions below should be set aside.

CONSTITUTIONAL AND ETHICAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

DR 2-103 of the Ohio and South Carolina Codes of Professional Responsibility provides in pertinent part:

> (A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.
>
> * * *
>
> (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
>
> * * *
>
> (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
>
> (a) The primary purposes of such organization do not include the rendition of legal services.
>
> (b) The recommending, furnishing or paying for legal services to its members is incidental and reasonably related to the

primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.[1]

* * *

DR 2-104 of the Ohio and South Carolina Codes of Professional Responsibility provides in pertinent part:

> (A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
>
> (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

* * *

QUESTION PRESENTED

Can the Bar constitutionally prohibit all solicitation without regard to its consumer benefits, or must it narrowly tailor its rules to prevent the few legitimate dangers that solicitation can involve?

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[1] *See* page 30, note 19, below, concerning the ABA amendment to DR 2-103(D).

STATEMENT OF THE CASES

A. Statement of Facts in No. 76-1650

In No. 76-1650, appellant Ohralik was indefinitely suspended from the practice of law for soliciting two clients in a personal injury case. The Ohio Supreme Court ruled that appellant's actions in securing employment violated DR 2-103(A), which prohibits attorneys from recommending their employment to non-lawyers, and DR 2-104(A), which prohibits attorneys from accepting employment that results from unsolicited advice given to laypersons concerning their legal rights. The record suggests that appellant would not have been retained if he had not initiated the contacts between himself and his clients, and it shows that both clients ultimately became dissatisfied with appellant's representation. However, the record also indicates that in the process of securing employment, appellant informed his clients that they possessed legal rights of which they might not otherwise have been made aware. Moreover, none of the reasons for the clients' ultimate disenchantment are traceable to the fact that it was appellant, rather than the clients, who initiated the contact that resulted in appellant's retention.

Appellant's representation of Carol McClintock, an 18 year old woman, was secured after he visited her in the hospital upon learning that she was injured in an accident while driving her parents' automobile. Appellant, who was already slightly acquainted with Carol, first heard about the accident from the postmaster's brother when he made one of his bi-weekly trips to the post office to pick up his mail. [Tr. 177-80].[2] Shortly thereafter, he called Carol's parents

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[2] "Tr." refers to designated pages of the transcript. Because *amici* have cited portions of the transcript that the parties have not included in the Appendix, page references have been made to the transcript itself. References to pages in the Appendix are followed by "a."

to inquire about her health, and apparently Carol's parents expressed some concern that they might be sued by Wanda Lou Holbert, Carol's passenger at the time of the accident. Mr. Ohralik then went to visit the parents and afterwards went to see Carol herself in the hospital. During his visit with Carol appellant advised her of her legal rights and they discussed the possibility of his retention on a one-third contingent fee basis. He then returned to the McClintock's home and was told that Carol had called to request him to represent her. Mr. Ohralik consented and began to discuss the accident with the McClintocks. [Tr. 180-90].

During his discussion with the McClintocks appellant assured them that they did not need to worry about being sued by Carol's passenger because Ohio had a guest statute which prohibited such suits. He also explained the operation and underlying theory of the guest statute, and explained other theories of liability that could supersede it, but advised the McClintocks that in their case they had little to fear. In addition, appellant explained the uninsured motorist coverage of the McClintocks' policy and informed them that Carol could be compensated for her injuries even though the driver who caused the accident had no liability insurance. He also explained how the negotiation and settlement process generally worked in personal injury cases. [Tr. 167, 182, 234, and 96a-105a].[3]

Mr. Ohralik next went to visit Wanda Lou Holbert, the passenger in Carol's car who had also been injured in the accident. Wanda had just returned home after being released from the hospital, and appellant stated that he was calling on her as a witness to the accident. Shortly after their conversation began, however, appellant volunteered that he

[3]Appellant made a tape recording of this conversation. The actual tape is in the record, and a transcript is reproduced in the Appendix.

was already representing Carol and offered to represent Wanda as well on a one-third contingent fee basis. Wanda said, "O.K.," and they then discussed the circumstances surrounding the accident. During this discussion, appellant explained the nature of the claims that Wanda had against the McClintocks' insurance company, he explained her obligations under their contingent-fee arrangement, and he cautioned her against speaking to insurance adjusters, frequently emphasizing that she was now represented by a lawyer. [118a-130a].[4]

The following day, February 14, 1974, appellant received a telephone call from Wanda's mother, during which she attempted to discharge him. Appellant, however, asserted that he was representing Wanda, an 18 year old, legally competent adult, and that Wanda's mother could not effectively discharge him. After this conversation appellant took no action to confirm his retention by Wanda but rather continued to assert claims on her behalf against the insurance company. Similarly, Wanda took no action to confirm her mother's attempted discharge. It was not until one month later, on March 14, 1974, that Wanda finally wrote a one sentence letter to appellant discharging him, apparently because of her feeling that there had been undue delay in her receipt of benefits from the insurance company. [Tr. 32, 63-65]. In addition, Wanda filed a grievance complaint against Mr. Ohralik.

In the meantime, Carol had also become dissatisfied with Mr. Ohralik's representation and wished to replace him with another attorney. She too stated that this was because of delay in receiving any payments from the insurance company, and because of what she stated was in-

[4]Appellant also tape recorded his conversation with Wanda.

sensitivity and neglectful representation on the part of appellant. [Tr. 97-99, 118, 197]. In Carol's case, however, appellant eventually obtained an agreement from the insurance company to pay her $12,500, the maximum amount available under the policy, but Carol refused to accept the money and refused to pay appellant the $4,166.66 he claimed as a contingent fee. Appellant then sued Carol to collect his fee, and Carol hired a second attorney to defend that suit. Ultimately, the suit was settled, and Carol paid appellant the full fee that he had demanded. She also paid her second attorney a $900 fee. [Tr. 118–19, 133–34, 138, 140–41]. As a result of her dissatisfaction with appellant's representation, Carol also filed a grievance complaint against appellant.

The complaints made by Wanda and Carol prompted the Ohio State Bar Association to request the initiation of formal grievance proceedings against appellant charging him with violating the two prohibitions on solicitation contained in DR 2-103(A) and DR 2-104(A). After conducting an evidentiary hearing, a three-member Panel of the Board of Commissioners on Grievances and Discipline found that appellant had unethically solicited Wanda and Carol in violation of those two code provisions, and recommended that he be given a public reprimand. Appellant had argued that the two ethical provisions under which he was charged were invalid because they unconstitutionally deprived him of his First Amendment right of Free Speech, but the Panel rejected this argument, devoting only a single sentence to it. On appeal, the Ohio Supreme Court upheld the Panel's ruling but, without explanation, increased appellant's punishment to indefinite suspension from practice and taxed $1797.28 in costs against him. The Ohio Supreme Court also summarily rejected appellant's First Amendment claim, again disposing of it in a single sentence. The present appeal to this Court followed.

Several features of these facts are significant. First, in the process of promoting his own services, appellant conveyed valuable information to many people concerning their legal rights. He not only advised Carol and Wanda that they had viable claims for damages even though the drunk driver who caused their accident had no liability insurance, but he also informed them that those claims could be asserted on a contingent-fee basis, entailing no risk of financial loss to them. These are facts of which Carol and Wanda were apparently unaware. In addition, appellant relieved Carol's parents' apprehensions concerning a potential suit against them by Wanda. [Tr. 167, 182, 234]. All of this information was provided free of charge, but it is unrealistic to think that appellant would have conveyed this information in the absence of the hope of future financial gain.

Another feature worth emphasizing is that although appellant's contacts with Carol and Wanda took place shortly after an accident, under circumstances that have traditionally been viewed as particularly fraught with the dangers of duress and overreaching, there is no evidence that either woman was unable to make a reasoned decision at the time that appellant was retained, and the disciplinary tribunals made no such findings. Moreover, the difficulties that developed later between appellant and his clients did not stem from the context in which they were approached or even from the fact that appellant initiated the contact. Rather, those difficulties, relating to the quality of appellant's representation, arose later when Carol and Wanda were no longer in particularly vulnerable positions.

B. Statement of Facts in No. 77-56

In No. 77-56, appellant Smith was publicly reprimanded for solicitation in violation of DR 2-103(D), which prohibits attorneys from assisting an organization to promote the use of their services if the organization recommends, furnishes, or pays for legal services, and DR 2-104(A) which prohibits attorneys from accepting employment that results from unsolicited legal advice that they have given to lay persons. The South Carolina Supreme Court ruled that appellant violated those provisions by informing a group of involuntarily sterilized welfare mothers that they could sue their doctors for damages, and then, in a subsequent letter, offering the services of the ACLU to represent one of those women on a *pro bono* basis. The record does not contain any indication that the welfare mothers were harmed by appellant's actions, and no such finding was made by the disciplinary tribunals. On the contrary, the record establishes that appellant informed those women about legal rights of which they would otheriwse have remained unaware.

The events leading to appellants' discipline began in the Summer of 1973 when the national press reported that indigent black women in Aiken County, South Carolina were being forced to submit to sterilization as a condition of receiving Medicaid benefits. Gary Allen, who was active in Aiken community affairs and who knew women who had been involuntarily sterilized, contacted the South Carolina Council on Human Rights requesting advice and assistance for the welfare mothers [Tr. 151]. In response, the Council decided to send appellant Smith, its legal consultant, to Aiken to speak to three welfare mothers that Mr. Allen had assembled. [Tr. 59-60, 90, 93-94].

Ms. Smith was particularly well suited for the task. She is a black woman attorney who graduated from the University of South Carolina law school and was admitted to practice in 1972. Although she was only 29 at the time of the Aiken meeting, she had already accumulated years of community service through her active involvement in civil liberties and human rights organizations while working her way through school. In addition to being a past Executive Secretary of the Council on Human Rights, and Chairperson of its student chapter while in college, Ms. Smith had also participated in a variety of voter registration, literacy, and day care programs, and has been on the faculty of three different universities in South Carolina, teaching constitutional and consumer law. At the time of the Aiken meeting appellant was not only legal consultant for the Council on Human Rights, but was an officer and member of the Board of Directors of the South Carolina Chapter of the ACLU, as well as an ACLU cooperating attorney. [Tr. 55-59, 75].

The Aiken meeting was scheduled by Mr. Allen for July, 1973. At that meeting appellant informed the welfare mothers that they could not legally be forced to choose between sterilization and loss of Medicaid benefits. She also informed them that they had a right to sue their doctors for money damages if sterilization operations had been performed on them as a result of such coercion. No arrangements to file any lawsuits were made at that meeting, however.

Shortly after the Aiken meeting was held, Mr. Allen wrote to Ms. Smith stating that Marietta Williams, one of the women who had attended, wished to file suit against her doctor.[5] By this time, the National ACLU had also

[5] There is conflicting testimony concerning whether Mrs. Williams ever told Mr. Allen that she wanted to file suit, but it is undisputed that this is what Mr. Allen reported to appellant.

become very interested in the problem of coerced sterilization and had communicated to appellant its desire to offer assistance. Consequently, on August 30, 1973, appellant wrote to Mrs. Williams, informing her that the ACLU had already agreed to represent another Aiken welfare mother in a suit against her doctor for involuntary sterilization and would like to represent Mrs. Williams also if she were interested in filing suit.[6]

Shortly after receiving the letter from appellant, Mrs. Williams took her child to the office of Dr. Pierce, the doctor who had performed her sterilization operation. For reasons that are not disclosed in the record, the doctor's lawyer was also present in the office at the time of this visit. Moreover, Mrs. Williams had taken appellant's letter with her to Dr. Pierce's office. During the meeting that followed, Mrs. Williams gave the letter to the lawyer, signed a form waiving any liability that Dr. Pierce might have for performing the sterilization operation, and then telephoned appellant from the doctor's office informing her that she did not wish to file suit against her doctor. [*See* Tr. 21–24].[7] Appellant did not contact Mrs. Williams again, Mrs. Williams never sued her doctor, and appellant never represented Mrs. Williams in any capacity. Subsequently, two other women did file suit against Dr. Pierce for coerced sterilization, *Doe v. Pierce,* No. 74–475 (D.S.C. 1974), but neither of these women were ever contacted or represented by appellant.

Mrs. Williams never filed a complaint with the Bar, the Attorney General, or anyone else concerning appellant's actions. However, Dr. Pierce's lawyer did file a complaint after he unsuccessfully attempted to use appellant's August 30, 1973 letter to Mrs. Williams in support of his claim

[6]This letter is reproduced at page 25a of appellant's Jurisdictional Statement. *See also* Tr. 18, 83, 152–53.

that *Doe v. Pierce* should be dismissed on grounds that the plaintiffs had been solicited. [*See* Tr. 21-24, 161-62, 164, 168]. As a result, on October 10, 1974, the Board of Commissioners On Grievances And Discipline charged Ms. Smith with solicitation in violation of unspecified provisions of the Canons of Ethics as a result of her August 30 letter.[7]

After an evidentiary hearing, a three-member Panel of the Commission On Grievances And Discipline found that, while there was no evidence establishing that appellant had solicited Mrs. Williams for her own benefit, she was guilty of soliciting Mrs. Williams on behalf of the ACLU – an organization that would benefit financially if the suit were successful and the Court were to award attorney's fees. The Panel ruled that appellant had violated DR 2-103(D) and DR 2-104(A), but recommended only a private reprimand after finding that appellant's activities were neither aggravated nor widespread. The Panel considered and rejected appellant's claim that her actions were protected by the First Amendment. On appeal, the South Carolina Supreme Court upheld the Panel's ruling but increased appellant's punishment to a public reprimand, rejecting the Panel's finding that the circumstances were not aggravated. No reason was given for the rejection of this finding, and all of the Panel's other findings were upheld. In fact, all but a few paragraphs of its opinion were quoted directly from the Panel Report, including the Panel's analysis of the First Amendment issues. The present appeal followed.

The facts of this appeal illustrate several considerations that are central to the issue of solicitation. First, appellant not only communicated to Mrs. Williams information

[7]The complaint is reproduced at page 23a of appellant's Jurisdictional Statement.

about legal rights of which she was unaware, but informed her that an attorney was available to assert her claims free of charge. [Tr. 6–7, 34, 39, 77, 79, 102, 106]. Because of Mrs. Williams' limited education and social circumstances, it is reasonable to conclude that she would never have learned about her legal rights if someone had not first approached her since it is unlikely that she would ever have consulted an attorney on her own. Moreover, information concerning the availability of a free attorney was especially valuable in this case where unpopular and politically controversial issues were involved, since available attorneys are likely to be difficult to find in such cases.

It is also significant that appellant offered the services of the ACLU without any hope of personal financial gain. Although there was a possibility that the ACLU would recover court-awarded attorneys' fees, there is no evidence whatsoever to suggest that financial considerations in any way motivated the ACLU's actions or those of appellant. Rather, appellant's background strongly suggests that she was motivated solely by a genuine desire to assist those whose interests were not adequately represented.[8]

The facts of this appeal also highlight the tendency of vague and broad disciplinary rules to be used for improper purposes. Even though Mrs. Williams had not complained about appellant's actions, Dr. Pierce's attorney apparently tried to use the suggestion of ethical violations to secure

[8] Appellant was not compensated for any of her ACLU activities, [Tr. 59], and even if she had ultimately represented Mrs. Williams herself, she could not have benefitted financially. Under the policy in effect at all times pertinent to this appeal, ACLU cooperating attorneys did not keep court-awarded attorneys fees. Those fees went to the ACLU Foundation to pay expenses and salaries of national and regional ACLU staff attorneys. [Tr. 103, 141]. Under a newly instituted policy, however, in some cases cooperating attorneys now retain court-awarded attorneys fees.

dismissal of *Doe v. Pierce* and, when that failed, to retaliate against appellant. [Tr. 21–24, 161–62, 164, 168].[9] Moreover, the fact that appellant's case is only the fourth reported disciplinary proceeding for solicitation in the entire history of the State of South Carolina strongly suggests that her solicitation proceedings had been instituted in a discriminatory manner. Despite the injustice and chilling effect that such use of the solicitation rules would have, the Panel did not make any findings in this regard and did not even allow appellant to introduce evidence of bad faith or retaliation. [*Id.*].

There are many other instances in which the Panel not only failed to make findings, but totally excluded evidence that appellant wished to introduce concerning consumer interests. For example, the Panel refused to hear evidence relating to whether indigents and minority individuals were frequently ignorant of their legal rights, even when this was offered to show the non-financial nature of appellant's motives. [Tr. 70–72]. The Panel also excluded evidence showing the difficulty that such individuals have in obtaining lawyers – especially for unpopular cases. [Tr. 125, 149–50]. Moreover, the Panel did not allow appellant to introduce evidence concerning the ACLU's commitment to informing unsophisticated clients about their legal rights and providing them with attorneys. Nor did it allow evidence showing that it is frequently necessary for the ACLU to initiate client contact in order to pursue its objectives effectively. [Tr. 123–25, 143–44]. Finally, the Panel did not even permit appellant to introduce evidence supporting her claim that institution of disciplinary proceedings against her under the facts of this case would deter other attor-

[9] If anyone should be disciplined as a result of the events in this case, Dr. Pierce's lawyer is the prime candidate.

neys from accepting controversial or unpopular cases. [Tr. 125-27, 128-29].

SUMMARY OF ARGUMENT

The provisions of the Code of Professional Responsibility which prohibit virtually all solicitation by attorneys unnecessarily deprive consumers of information concerning their legal rights and violate the First Amendment. Solicitation rules are intended to protect the interests of consumers, but because the present rules prohibit all solicitations rather than distinguishing between helpful and harmful solicitations, they do consumers a disservice. The present rules are not only capable of producing absurd results, but they are inconsistent with many other Code provisions. Moreover, because those rules are dangerously vague and overbroad, they have a substantial *in terrorem* effect. Consequently, the present solicitation rules are in serious need of substantial modification.

Because solicitation involves the communication of potentially useful information to consumers, First Amendment protections apply to solicitation. Last term's decision in *Bates v. State Bar of Arizona, supra,* indicates that neither the commercial nature of some solicitations, nor the fact that the legal profession is involved eliminates these First Amendment protections. Since the First Amendment applies, the solicitation rules can be upheld only if they are shown to be the least restrictive means of achieving a compelling state interest, and the state's interest in prohibiting solicitation is shown to outweigh the consumer benefits. *NAACP v. Button,* 371 U.S. 415, 438-39 (1963); *Lamont v. Postmaster General,* 381 U.S. 301, 308-09 (1965); *Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972); *Shelton v. Tucker,* 364 U.S. 479,

488-90 (1960); *Talley v. California,* 362 U.S. 60, 62-64 (1960); *Broadrick v. Oklahoma,* 413 U.S. 601, 611-12 (1973).

While there are many important consumer benefits to be obtained from solicitation, the justifications traditionally offered to support banning solicitations are without merit, and most have already been rejected by this Court in *Bates.* Moreover, the one danger to which solicitation rules may properly be directed—the danger of undue influence—can be prevented by alternatives which are less restrictive than a total prohibition and which preserve the informational value of solicitation. Consequently, the present solicitation rules violate the First Amendment.

Applying these standards to the cases before this Court, the particular conduct of appellant Smith is not commercial in nature and is, therefore, entitled to full First Amendment protection under *NAACP v. Button, supra.* Although appellant Ohralik's conduct constituted commercial speech, it is still protected by the First Amendment because it did not pose any of the legitimate evils underlying solicitation rules. Therefore, the disciplinary orders entered against each appellant should be set aside.[10]

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[10]The records of both appeals suggest that serious due process problems exist concerning the disciplinary procedures to which each appellant was subjected. *Amici* have not addressed those due process questions because their primary interest concerns the constitutionality of the solicitation rules under the First Amendment. *Amici* assume that the parties will discuss the due process issues, and do not by their silence intend to suggest that due process requirements were met.

ARGUMENT

I. THE PRESENT SOLICITATION RULES ARE ARE SERIOUSLY IN NEED OF MODIFICATION.

The provisions of Canon 2 of the ABA Code of Professional Responsibility now prohibit virtually all solicitation of clients by lawyers. However, not all communications termed "solicitation" are harmful; often solicitation results in the flow of valuable information from lawyers to consumers concerning both their legal rights *and* the availability of attorneys willing to assert those rights. Nevertheless, the ABA rules make no attempt to distinguish between useful and harmful solicitations. Moreover, since those rules have been adopted by nearly every state, the degree to which they can suppress the flow of useful information is enormous. Consequently, the current rules concerning solicitation are in serious need of substantial modification.

The need for a new approach to solicitation is easily documented. Imagine the following scene. A woman enters a municipal courts building, holding her young son by the hand. She speaks almost no English. She is intimidated and frightened by the imposing surroundings. She does not want to be there, but she has received a summons requiring her to appear somewhere in that building because her landlord is trying to evict her and her family. On the verge of despair, she is approached by a smiling young man who asks her in her own language whether there is anything that he can do to help. After hearing about her predicament, the young man takes her to his employer, a lawyer, who accompanies her to court, prevents the eviction, and accepts a modest fee. The woman is, of course, very appreciative, but the bar is not. A grievance complaint is issued and the lawyer is disciplined for solicitation. This is essentially what happened in *In Re Solomon Cohn*, and from the standpoint of consumer

interests, the result is absurd. Solicitation rules that cannot distinguish between the *Cohn* case and a case involving genuine abuses are in serious disrepair and in bad need of major modifications.[11]

The present solicitation rules are also inconsistent with many other Code provisions. For example, a lawyer has an important duty to assist the legal profession in making legal counsel available. This is because

> [t]he need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. EC 2-1 [footnotes omitted].

Consequently, the Code directs lawyers to "assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed." EC 2-2 [footnote omitted].

The Code also admonishes lawyers to charge a reasonable fee to those who can afford to pay since "[t]he legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate

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[11] This case is reported in the *New York Law Journal*, Feb. 19, 1974, p. 2, cols. 6-7, and is discussed by Professor Monroe H. Freedman in his book *Lawyers' Ethics In An Adversary System*, Ch. 10, Bobbs-Merrill (1975).

compensation for services rendered." EC 2-16.[12] But when a client is impecunious, "[t]he rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer." EC 2-25. Lawyers also have a special obligation to represent clients asserting unpopular or controversial causes. EC 2-27. Finally, it is every lawyer's duty to help improve the legal system so that it "commands public respect and fosters the use of legal remedies to achieve redress of grievances." EC 8-1. *See also* EC 8-2 and EC 8-3.

The irony in all of this is striking. Lawyers have independent obligations to make legal services available, to inform lay persons of their legal rights, to charge an adequate fee or provide free representation to indigents, and to foster the use of legal remedies, but when they are all added together, they total solicitation – a prohibited activity. Such a calculus is difficult to justify. If fulfilling one of a lawyer's obligations is good, then fulfilling all of them ought to be even better.

An additional defect in the ABA's approach to solicitation lies in its undue focus on motivation. The Code allows certain communications to be made to potential clients only if they are not motivated by the hope of financial gain. *See* EC 2-3 and EC 2-4. Financial motivation, however, does not render a communication *per se* useless or harmful as the ABA would have us believe. On the contrary, under our free enterprise system, the profit motive is not only acceptable but is frequently cited as the cause of quality goods and services that have led to our high standard of living. Indeed, many attorneys probably

[12] The legal profession seems to have taken this obligation quite seriously. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

entered the legal profession at least in part because it is a lucrative one, but no one has suggested that this makes the quality of their services suspect. *See Bates v. Arizona State Bar, supra,* slip op. at 20, 45 U.S.L.W. at 4900-01. In fact, it is reasonable to conclude that the flow of valuable information to legal consumers will actually increase if lawyers are permitted to benefit financially from such communications.[13]

Solicitation rules are intended to benefit consumers of legal services. They are not designed to serve the economic interests of lawyers, nor are they meant to provide ammunition for disciplinary tribunals desiring to discourage unpopular litigation. However, as these appeals illustrate, the organized bar has lost sight of the primacy of consumer interests. Consequently, the Court should use this opportunity to reevaluate the legal profession's entire approach to solicitation, and in so doing should give foremost consideration to the interests of consumers.

[13] Although financial motivation seems central to the general ban on solicitation, the *Smith* case shows that the breadth and vagueness of solicitation rules allow them to be used even where free legal services are offered to indigents with important constitutional claims, and to be used in a highly arbitrary manner that makes them likely candidates for abuse.

II. THE SOLICITATION RULES UNDER WHICH APPELLANTS WERE DISCIPLINED VIOLATE THE FIRST AMENDMENT.

A. First Amendment Protections Apply To Communications That Are Now Prohibited.

Because solicitation involves the communication of information, First Amendment protections apply. *See Bates v. State Bar of Arizona, supra.* When lawyers advise potential clients of their rights and offer their services, they are, of course, engaged in speech. Moreover, when consumers listen, they are receiving information from a willing speaker. Because the First Amendment was intended to foster communication – which requires both the dissemination and receipt of information – the right to receive has repeatedly been recognized by this Court as a First Amendment right existing independently of the rights of the speaker. *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General, supra*, 381 U.S. at 307; *Martin v. Struthers*, 319 U.S. 141, 143 (1943). Consequently, even if an attorney's interest in soliciting were unable to survive First Amendment scrutiny, the interest of consumers alone in receiving the information conveyed through solicitation would entitle solicitation to protection. *Compare Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*, with *Patterson Drug Company v. Kingery*, 305 F. Supp. 831, 825 (W.D. Va. 1969) (three-judge court). Of course, as this Court has recognized, the most sensible approach is to consider all of the First Amendment interests involved rather than isolating them, because the First Amendment's function is to protect the free flow of information from speaker to recipient. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*, 425 U.S. at 756-57.

It can no longer be tenably asserted that the commercial nature of some solicitation deprives it of First Amendment protections. The Court rejected a *per se* commercial speech exception to the First Amendment in the *Pharmacy* case, 425 U.S. at 761-70, and reaffirmed that holding with respect to the legal profession in *Bates*, stating that the result flowed *a fortiori* from the *Pharmacy* opinion. Slip op. at 13-14, 45 U.S.L.W. at 4898-99. Likewise, the conclusion that solicitation rules merit First Amendment protections may be said to flow *a fortiori* from the *Bates* decision. The similarities between the advertising involved in that case and the solicitation involved in the present cases are strong. All three cases involve suppression of information that is potentially very useful to consumers. Moreover, they all adopt the paternalistic approach toward the public that was so forcefully rejected in *Bates*:

> [W]e observed that "on close inspection it is seen that the State's protectiveness of its citizens rests in large part on the advantages of their being kept in ignorance." *Id.*, at 769. But we noted the presence of a potent alternative to this "highly paternalistic" approach: "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.*, at 770. The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice "that the First Amendment makes for us." *Ibid.* See also *Linmark Associates, Inc. v. Willingboro*, [431] U.S. [85,

97] (1977). [Slip op. at 13, 45 U.S.L.W. at 4899, *quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra*].

Further, all three prohibitions are based on similar illogical assumptions. As Mr. Justice Blackmun stated in *Bates*, "[i]f the commercial basis of the [lawyer-client] relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office." Slip op. at 17, 45 U.S. L.W. at 4900. Similarly, if a lawyer may advise clients about their legal rights when clients initiate the contact, it is difficult to see why communication about the very same rights is prohibited simply because a lawyer initiated the contact rather than a potential client.[14]

Because the First Amendment applies, solicitation rules must be strictly scrutinized, and they can be upheld only if certain demanding tests are met. Traditionally, where First Amendment rights are involved, state modes of regulation can be sustained only if they are shown to further a compelling state interest, and to be narrowly drawn so as to entail the least possible intrusion on protected activities. *NAACP v. Button, supra*, 371 U.S. at 438-39; *Lamont v. Postmaster General, supra*, 381 U.S. at 308-09; *Dunn v.*

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[14] As if to emphasize the similarities between *Bates* and the present case, appellee Ohio State Bar Association relies on an old Fourteenth Amendment due process case to justify its ban on solicitation, just as the Arizona State Bar relied on Fourteenth Amendment due process cases to justify its ban on advertising. *See* page 5 of the Ohio Bar Association's Motion To Dismiss. This reliance, of course, proved to be misplaced. *See, Bates v. Arizona State Bar*, slip op. at 5-7, 45 U.S.L.W. at 4897.

Blumstein, supra, 405 U.S. at 342-43; *Shelton v. Tucker, supra*, 364 U.S. at 488-90; *Talley v. California, supra*, 362 U.S. at 62-64; *Broadrick v. Oklahoma, supra*, 413 U.S. at 611-12. *Cf. United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). In *Bates*, the Court suggested that these protections might be somewhat limited because of the commercial nature of the underlying transaction, but the test is still a strict one.[15] Finally, because the First Amendment is involved, any proffered justifications for solicitation should be rooted in actual evidence rather than theoretical speculation.

Although the term "solicitation" conjures up specters of ambulance chasing and prowling the hospital wards, the strong emotional reactions that are often evoked by the term should not be allowed to obscure the analysis necessary to ensure that First Amendment rights are given adequate protection.

> The Court has stated that "a State cannot foreclose the excercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. at 429 . . . . Regardless of the particular label asserted by the State – whether it calls speech "commercial" or "commercial advertising" or "solicitation" – a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly

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[15] Appellant *Smith*, and all other attorneys who are motivated by non-financial rewards, can hardly be accused of commercial solicitation and, therefore, should be entitled to full First Amendment protections.

served by the regulation. [*Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)].[16]

Inquiry must, therefore, be made into the justification for the present solicitation rules to see if they bear a sufficient relationship to a legitimate state interest to withstand First Amendment scrutiny. In conducting this inquiry, the objective should be to maximize the flow of valuable information to consumers while minimizing any incidental dangers.

B. Consumers Have A Substantial Interest In Receiving Information Concerning Their Particular Legal Rights That Greatly Outweighs Any Interest That The Bar Has In Suppressing All Solicitations.

Bates held that the benefits of lawyer advertising to consumers outweighed the potential harms cited by the organized bar to justify a total ban on advertising. As shown below, the benefits to be derived from solicitation may be even greater than the benefits of advertising, and many of the danger are not as serious. Consequently, in many respects, the First Amendment case for solicitation is even stronger than the case for advertising.

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[16] Indeed, advertising and solicitation can be so closely related that it may be difficult to distinguish between the two. For example, if an attorney specializing in probate work sent a copy of a previously-run newspaper advertisment to the families of individuals listed in the obituary column of the newspaper, would that be advertising or solicitation? Regardless of how it is classified, the validity of that conduct should not be determined by the label applied to it.

While advertising can provide consumers with generalized information about legal services, as well as standardized price information, the information conveyed through solicitation can be much more useful since potential clients are given information about their specific legal rights in particular cases. In addition, the potential clients learn about attorneys willing to handle their particular cases at a specified fee tailored to their cases. This is precisely what happened in *Ohralik*. The two clients were advised of their rights arising out of a specific accident, and they learned that at least one attorney was willing to represent them on a contingent-fee basis involving no financial risk to themselves.

Solicitation can also provide economic benefits to consumers. Appellant Ohralik, for example, might well have charged each of his clients less than his full fee since much of the work he did might have been useful in both cases. This is much more likely to happen if lawyers are permitted to solicit multiple clients with closely related legal claims.[17] Moreover, if lawyers were permitted to solicit, competition and its beneficial effects on the cost and quality of service would be enhanced. Perhaps Carol and Wanda had such strong claims that another attorney would have offered a one-fourth contingent fee if he or she had been permitted to compete by soliciting. If solicitation were permitted, there would be a strong incentive for lawyers to increase the quality of their representation and to reduce their fees.

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[17] Indeed, the failure to charge a reduced fee in such a situation might well constitute a violation of DR 2-106 which prohibits an attorney from collecting an excessive fee. Of course, multiple representation would also be governed by the conflict-of-interest provisions of Canon 5.

The one danger that troubled Chief Justice Burger and Justices Powell and Stewart in *Bates* is entirely absent in the context of solicitation. They believed that the advertising of standardized fees for legal services was likely to be misleading – even inherently misleading – because fees must be set for every case individually. When attorneys solicit, however, the legal advice that they offer, including the communication of fee information, is rooted in a particular case, and, therefore, the dangers of consumers being misled are greatly reduced. It should also be noted that while advertising can potentially increase the costs of legal services by increasing a lawyer's overhead, solicitation does not entail such increased expenditures. Consequently, fees are less likely to be increased as a result of solicitation than as a result of advertising.

The *Smith* case illustrates a different, and perhaps more compelling interest that can be served by solicitation. There, Mrs. Williams, an indigent, uneducated, black welfare mother was informed about her constitutional rights as a result of appellant's "solicitation" of her. By interfering with that communication, the State of South Carolina not only interfered with the right to disseminate and receive information, but in a very real sense it interfered with Mrs. William's First Amendment right to petition the courts to redress her grievances since it is unrealistic to think that she would ever have consulted an attorney on her own. Moreover, both appellant Smith and the ACLU are demonstrably committed to the advancement of human rights and civil liberties. By approaching Mrs. Williams they too were attempting to advance their causes through access to the courts, a well recognized First Amendment activity. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *United Transportation Union v. State Bar of Michigan*, 401 U.S.

576, 585 (1971); *United Mine Workers v. Illinois Bar Ass'n.*, 389 U.S. 217 (1967); *Brotherhood of R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button, supra.*[18] In addition, society in general is benefitted from the broad remedial effects of successful test case litigation involving important constitutional rights such as that contemplated by appellant Smith.

Relaxation of solicitation restrictions would also benefit consumers by allowing free development of alternative legal services delivery mechanisms. DR 2-103(D), one of the provisions that appellant Smith was found to have violated, broadly prohibits attorneys from assisting organizations to promote the use of their services. Although some exceptions are specified, the prohibition still explicitly applies to organizations whose primary purpose is the rendition of legal services, or who derive financial gain from rendering such services. DR 2-103(D)(5)(a)-(d). By its terms, this provision prohibits attorneys from joining together to establish a legal clinic or any other type of innovative law office that simply advertises its existence, since they would be cooperating with a non-qualifying organization. This provision would also prohibit attorneys from publicly offering prepaid legal service plans, even though such plans may well be essential to adequately meet the legal needs of the public. In fact, the very activity found by this Court to be protected in *Bates* is prohibited by DR 2-103(D). Therefore, unrestrained Bar manipulation of solicitation rules could have the effect of taking back many

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[18] The activities of appellant Smith vis-a-vis the ACLU are very similar to the "solicitation" upheld by this Court in *Button*. As she urgeda in her Jurisdictional Statement, that case certainly appears to control the outcome in her appeal.

of the benefits that this Court gave to consumers in *Bates*, especially with respect to the development of alternative legal service delivery systems.[19]

Against these benefits, the justifications that are traditionally offered to support solicitation prohibitions are woefully inadequate, and most are not even properly cognizable. The most frequently offered justification is that solicitation is improper because it undermines the dignity of the legal profession. This emotional, non-analytical assertion is steeped in rhetoric and tradition rather than based on a genuine concern for the legitimate needs of the public. Moreover, as the Court recognized in *Bates*, an argument based on "dignity" is itself misleading because it seeks to mask the fact that lawyers are motivated by financial incentives like other business men and women. Slip op. at 16-20, 45 U.S.L.W. at 4900-01. It has also been argued that solicitation prohibitions are justified because they prevent litigation that would not otherwise be commenced. The presumption that litigation is somehow bad in and of itself, however, is inconsistent with the many cases that have found litigation to be a form of expression and an exercise of the right to petition protected by the First Amendment. *See* pages 28-29, above. Consequently, this Court also rejected that offered justification in *Bates*. Slip op. at 23-25, 45 U.S.L.W. at 4900-01

The justification that solicitation prohibitions prevent client stealing is also inadequate. This is a justification furthering the economic interests of lawyers at the expense

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[19] One of the reasons that this provision is so broad is that it uses the terms "assisting to promote" and "cooperate with" as if they were synonymous. The language of this section has now been amended in the ABA Code. However, even under the new language, all of the actions described herein would still be prohibited.

of competitive benefits to consumers. As *amici* have repeatedly emphasized, solicitation rules are for the protection of consumers not lawyers – and consumer interests should be given primary consideration in determining their validity. Solicitation rules are also unable to be justified by the assertion that they help to prevent abuses that can occur when lawyers meet with clients behind closed doors. They simply are not directed at such abuses which can occur independently of who initiates the contact.

Finally, the claim that a total prohibition on all solicitation is necessary because of the difficulties of application to individual cases cannot suffice. This justification not only makes the rules amenable to abuse, as the *Smith* case demonstrates, but it flies directly in the face of the First Amendment's least restrictive alternative requirement. Moreover, the Bar's argument that wide latitude is necessary to prevent unsophisticated consumers of legal services from being abused by lawyers is inconsistent with its "professionalism" justification. The Bar may portray attorneys as pillars of virtue and altruism, or as scoundrels ready to pounce on unsuspecting members of the public, but not both. This Court pointed out that contradiction in *Bates* when it rejected the difficulties-of-enforcement justification, and that contradiction is equally present in the solicitation context as well. Slip op. at 27, 45 U.S.L.W. at 4903.

C. Many Narrowly Drawn, Less Restrictive Alternatives Are Available To Guard Against Any Abuses That Might Result From Solicitation.

There is one legitimate justification for solicitation rules: to prevent overreaching and duress that can result when a potential client is in a situation where his or her judgment might be impaired. The exceptions to the general solicitation ban in fact suggest that this is one of the interests of underlying solicitation rules. DR 2-104 generally prohibits a lawyer from accepting employment by one to whom he or she has given unsolicited advice, but that does not apply to family, friends, and established clients, presumably because a lawyer will not take advantage of these classes of individuals. DR 2-104(A)(1). It is also common knowledge that solicitation occurs at country clubs and other civic and social settings, *see Bates v. State Bar of Arizona, supra,* slip op. at 19, 45 U.S.L.W. at 4901, but no one is especially troubled by this since the lawyer and the potential clients typically deal at arms length in such contexts, and the clients are considered able to fend for themselves.

Amici agree that the prevention of undue influence, duress, and overreaching are important consumer interests, but they should be dealt with directly through narrowly tailored rules rather than through overbroad prohibitions. It would be more prudent – and consistent with the First Amendment – to develop solicitation rules that are specifically directed at the problem of undue influence. Although First Amendment protections would continue to apply to solicitation, narrowly drawn rules would survive the First Amendment balancing test and could, therefore, be upheld as constitutional.

In contexts such as that of the *Smith* case, where an attorney approaches an individual on behalf of an organization

out of a sense of duty to assist that person in asserting his or her rights, the dangers nearly vanish. Potential clients in such contexts are more like friends and relatives who are presently exempted from the solicitation prohibition set out in DR 2-104. *See* DR 2-104(A)(1). Because of the strong identity of interest between the lawyer, the organization, and the potential client, only very minimal regulation of the transaction is necessary. This Court has also emphasized that identity of interest is a constitutionally significant factor in invalidating solicitation rules that might otherwise be upheld. *NAACP v. Button, supra,* 371 U.S. at 443. Moreover, because solicitation on behalf of an organization like the ACLU is not commercial in nature, full First Amendment protections apply.[20]

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[20] In *Bates*, the Court stated that the overbreadth doctrine applied weakly if at all to commercial speech and as a result, a plaintiff could not merely demonstrate that some protected speech was prohibited by the challenged regulation but had to show that his or her speech was itself protected as well. Slip op. at 29, 45 U.S.L.W. at 4903. In the *Smith* context, however, there is a pressing need to apply the overbreadth doctrine because the *in terrorem*, chilling effect that the overbreadth doctrine is intended to prevent is ominously present.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 425 U.S. at 771-72, n.24, the Court suggested that the long standing First Amendment prohibition on prior restraints might also be inapplicable in commercial speech contexts. However, the need to revitalize the prior restraint doctrine in the solicitation context is apparent. Often speed in learning about one's legal rights is essential if meaningful redress is to be obtained. *See* EC 2-2. Moreover, from the consumer's point of view, solicitation prohibitions are prior restraints in the fullest meaning of the term. Because solicitation rules operate on parties over whom consumers have no control (members of the Bar), consumers cannot even risk violating those rules at their peril. Thus, they are completely at the mercy of the lawyers to whom solicitation rules apply.

In commercial contexts more traditionally associated with solicitation, such as the circumstances of the *Ohralik* case, the dangers of undue influence may be more pronounced. However, several alternatives which are less restrictive than a total prohibition on solicitation are available to guard against this danger. For example, lawyers could be required to confirm their employment contracts in writing within a specified period of time after the initial retention. This would allow newly obtained clients to reflect upon their initial employment decisions, to ask more questions, to seek other advice, or merely to have a change of heart. Such a confirmation requirement would avoid extended periods of ambiguity, such as the one month period during which appellant Ohralik believed himself to be representing Wanda but Wanda apparently believed that he had been discharged. Moreover, a confirmation requirement would place soliciting attorneys on notice that their employment contracts were subject to unilateral rescission so that they would not needlessly expend non-essential time on a case at its early stages. Another alternative is to prescribe a "cooling-off" period during which a solicited client has an absolute right to rescind the employment contract with no financial obligation. Again, the lawyer would be on notice not to provide non-essential legal services during this "cooling-off" period.

Soliciting attorneys could also be required to advise their clients at the time of the solicitation of their right to rescind their employment agreements if the clients became dissatisfied with their attorneys' representation. The *Ohralik* case suggests that once Carol and Wanda became dissatisfied, they may nevertheless have felt tied into their earlier agreements. An affirmative disclosure of the right to discharge counsel would eliminate this misimpression. After such a rescission, which could occur at any time, the attorney

would be compensated on a *quantum meruit* basis for the reasonable value of the services already rendered.

Finally, the Court in *Bates* emphasized that prohibitions on false, deceptive, and misleading advertising were proper. Slip op. at 31, 45 U.S.L.W. at 4904. Moreover, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, supra,* 748 U.S. at 771, the Court recognized that certain time, place, and manner restrictions could serve as valid restraints on commercial advertising. This suggests that restrictions on the settings in which solicitation can occur would be upheld if closely enough associated to the danger of undue influence. Consequently, a rebuttable presumption that solicitation at the scene of an accident or in a hospital involves undue influence might be sustainable since it shifts to the attorney the burden of justifying his or her actions. However, since many individuals would retain their independence and unimpaired judgment in such settings, an irrebuttable presumption probably could not withstand constitutional scrutiny.

It is, of course, not the duty of litigants or of this Court to draft acceptable rules for the Bar to use in regulating solicitation. Nevertheless, the suggested alternatives indicate that the beneficial flow of information that accompanies solicitation can be preserved while minimizing the dangers of undue influence. Consequently, those alternatives are preferable to the Bar's current prohibition of all solicitation. The organized bar has already tried extensive regulation of advertising and solicitation, and it has not proven to be in the consumers' best interest. Now it is time to experiment with minimal regulation in this area to see whether consumers will fare any better. By proscribing only those activities that are likely to cause some harm, the benefits of adequate information flow will

be fostered. If problems do arise, the legal profession can fashion remedies to deal with those demonstrated problems rather than with speculative, theoretical ones. Freer experimentation in this area is not only suggested by prudence but is compelled by the Constitution.[21]

III. THE CONDUCT OF EACH APPELLANT IS PROTECTED BY THE FIRST AMENDMENT.

As a result of this Court's ruling in *Bates*, it is not sufficient in the commercial speech context to demonstrate that a disciplinary rule is overbroad. An appellant must also demonstrate that his or her particular conduct is protected. Slip op. at 29, 45 U.S.L.W. at 4903. However, both appellants are able to make that showing in the present appeals.

As *amici* noted above at pages 32-33, appellant Smith's actions were not financially motivated, and she did not stand to benefit financially from those actions. Rather, she was attempting to advise a disadvantaged individual of her legal rights and to assist her in asserting those rights. Consequently, Ms. Smith's actions did not constitute commercial speech, and she is, therefore, entitled to the full protection of the First Amendment. Moreover, her actions fall well within the sphere of activities to which this

[21] Better reasoned approaches to solicitation are already beginning. On November 9, 1976, the Board of Governors of the District of Columbia Bar approved, and recommended that the District of Columbia Court of Appeals adopt, changes in Canon 2 that would permit the types of solicitation at issue in the present appeals. ~~Moreover, in response to *Bates*, the ABA drafted two proposed modifications to Canon 2. Although the more restrictive *Proposal A* was adopted, *Proposal B*, which would also allow the types of solicitation here at issue, is being circulated to all state bars along with *Proposal A*.~~

Court has consistently accorded First Amendment protections. Not only was Ms. Smith's freedom of speech at stake, but her right to associate with the ACLU, and to pursue their common objectives through litigation, was also involved. The facts of the *Smith* case closely parallel the facts in *NAACP v. Button, supra*, in which this Court upheld the First Amendment right of the NAACP to "solicit" plaintiffs for school desegregation suits after recognizing the same rights of expression and petition that are at issue here. *Button* and its progeny, *see* pages 28-29, above, control the *Smith* appeal and unambiguously establish that appellant Smith's activities are protected by the First Amendment.

Although appellant Ohralik's actions appear to comprise commercial speech, they are, nevertheless, protected by the First Amendment. Mr. Ohralik was not charged with fraud or misrepresentation so that he is not disqualified from First Amendment protection for either of those reasons. Moreover, the disciplinary tribunals made no findings of duress, overreaching, or undue influence, so that the rationale underlying solicitation rules does not cut off First Amendment protections either. While the record does show that appellant Ohralik's clients became dissatisfied with his representation, he was not charged with violation of any of the ethical provisions regulating the manner of client representation or the reasonableness of his fees. The Ohio Board of Commissioners on Grievances and Discipline instead chose to charge him with solicitation. Since appellant Ohralik was not found to have committed any of the evils to which properly drawn solicitation rules would be directed, his actions too are protected by the First Amendment.

CONCLUSION

The present ban on solicitation by attorneys unnecessarily deprives consumers of information about their legal rights and and the availability of attorneys to assert those rights. Because many less restrictive alternatives exist which can minimize any legitimate dangers, while preserving the beneficial flow of information to consumers, a total prohibition on all solicitation cannot withstand First Amendment scrutiny. Moreover, because the particular actions of the appellants who were charged with violating those rules are protected by the First Amendment, this Court should set aside the disciplinary orders of the State Supreme Courts below.

Respectfully submitted,

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November 17, 1977

Supreme Court, U. S.
FILED
DEC 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1650

ALBERT OHRALIK,
Appellant,
v.
OHIO STATE BAR ASSOCIATION,
Appellee.

On Appeal from the Supreme Court of Ohio

BRIEF FOR AMICUS CURIAE THE STATE BAR OF CALIFORNIA

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SUBJECT INDEX

	Pages
Interest of Amicus Curiae	1-10
A. Nature of Amicus Curiae	1-5
B. California's Rules Protect the Public From the Risks of Harm Inherent in Ambulance Chasing and Direct Solicitation by Attorneys for Their Own Purposes	5-10
Summary of Argument	11-16
Summary of Facts Revealed by the Record	17-51
A. Carol and Wanda Were Seriously Injured in an Automobile Accident	19-20
B. Ohralik Hardly Knew Carol and Wanda Prior to the Accident	20-23
C. Ohralik Solicited Carol	23-41
1. Ohralik First Telephoned Carol's Home	23-25
2. Ohralik Claims to Have Visited Carol's Parents Before Going to the Hospital	26-29

	Pages
Summary of Facts (Cont'd)	
3. Ohralik Visited Carol at the Hospital	30-37
4. Ohralik Then Went to the McClintock's Home	37-41
D. Ohralik Solicited Wanda at Her Home Immediately After Leaving the McClintocks	41-46
E. Wanda Subsequently Attempted to Discharge Ohralik	46-48
F. Carol Also Attempted to Discharge Ohralik	48-51
Argument - IN THE EVENT THIS COURT UNDERTAKES THE REQUISITE CONSTITUTIONAL BALANCING ITSELF, THE BALANCE SHOULD BE STRUCK IN FAVOR OF THE PROHIBITION AGAINST ATTORNEYS SOLICITING PROFESSIONAL EMPLOYMENT FOR THEIR OWN PURPOSES	52-75
A. Introduction	52-53
B. The California Prohibition Was Formulated by the California Bar and Approved by the California Supreme Court in Response to Strong Public Outrage at Solicitation	53-56

	Pages
Argument (Cont'd)	
C. The Prohibition Protects the Public from Situations Which, by Their Very Nature, Subject the Public to Risks of Invasions of Privacy, High-Pressure Salesmanship, Undue Influence, Overreaching, Misleading and Deceptive Practices, Divided Loyalties, Inadequate Representation and Other Breaches of Fuduciary Duties	56-70
D. The Ohralik Case Provides Yet Another Example of the Risks to Which the Public and the Administration of Justice Are Exposed when Attorneys Solicit Profes-ional Employment for Their Own Purposes	70-75
Conclusion	76
Appendices	
A. The Four Versions of the Facts in the Ohralik Case	1-8
B. Citations to Reported Decisions of the California Supreme Court Imposing Discipline on Attorneys for Direct Solicitation and Ambulance Chasing	1-3

CITATIONS

Cases:	Pages
Barton v. State Bar (1930) 209 Cal.677, 289 P. 818	5
Bates v. State Bar of Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691	7-8, 9, 14
Best v. State Bar (1962) 57 Cal.2d 633, 21 Cal.Rptr. 589, 371 P.2d 325	60, 61, 64, 67
Bigelow v. Virginia (1975) 421 U.S. 809, 95 S.Ct. 2222	14
Breard v. City of Alexandria (1951) 341 U.S. 622, 71 S.Ct. 920	76
Brotsky v. State Bar (1962) 57 Cal.2d 287, 19 Cal.Rptr. 153, 368 P.2d 697	2
Chronicle Publishing Company v. Superior Court (1960) 54 Cal.2d 548, 7 Cal.Rptr. 109, 354 P.2d 637	4
Dahl v. State Bar (1931) 213 Cal. 160, 1 P.2d 977	65, 68
Dudney v. State Bar (1931) 214 Cal. 238, 4 P.2d 770	65
Emslie v. State Bar (1974) 11 Cal.3d 210, 113 Cal.Rptr. 175, 520 P.2d 991	2

Cases:	Pages:
Ewell v. State Bar (1934) 2 Cal.2d 209, 40 P.2d 264	60, 63, 64, 66
Fish v. State Bar (1931) 214 Cal. 215, 4 P.2d 937	58, 59, 60, 63
Geffen v. State Bar (1975) 14 Cal.3d 843, 122 Cal.Rptr. 865, 537 P.2d 1225	6, 59, 60, 63, 64
Goldman v. State Bar (1977) 20 Cal.3d 130, 141 Cal.Rptr. 447, 570 P.2d 463	57, 59, 60
Higgins v. State Bar (1956) 46 Cal.2d 241, 293 P.2d 241	59
Honoroff v. State Bar (1958) 50 Cal.2d 202, 323 P.2d 1003	58, 60, 61
Howe v. State Bar (1931) 212 Cal. 222, 298 P. 25	65, 66, 68
Hutchins v. Municipal Court (1976) 61 Cal.App.3d 77, 132 Cal.Rptr. 158	54
Irving v. State Bar (1931) 213 Cal. 81, 1 P.2d 2	65, 68
Jacobellis v. State of Ohio (1964) 378 U.S. 184, 84 S.Ct. 1676	15, 17
McCue v. State Bar (1935) 4 Cal.2d 79, 47 P.2d 268	58

Cases:	Pages:
Mitton v. State Bar (1958) 49 Cal.2d 686, 321 P.2d 13	60, 61
Penaat v. State Bar (1944) 25 Cal.2d 26, 152 P.2d 442	62, 67
In the Matter of the Proposed Repeal of Rule 2-106, Rules of Professional Conduct, Cal. Sup.Ct. Bar Misc. No. 3922	9
Recht v. State Bar (1933) 218 Cal. 352, 23 P.2d 273	62, 64, 67
Richardson v. State Bar (1942) 19 Cal.2d 707, 122 P.2d 889	62
Ring v. State Bar (1933) 218 Cal. 747, 24 P.2d 821	68
Roth v. State Bar (1937) 8 Cal.2d 656, 67 P.2d 337	58, 62, 69
Sawyer v. State Bar (1934) 220 Cal. 702, 32 P.2d 369	62
Shaw v. State Bar (1931) 212 Cal. 52, 297 P. 532	65, 66, 68
Smallberg v. State Bar (1931) 212 Cal. 113, 297 P. 916	59, 65, 66, 67, 68
Smith, In re Edna (U.S.Sup.Ct. Docket No. 77-56)	6, 7, 10
Smith v. State Bar (1930) 211 Cal. 249, 294 P. 1057	65, 66, 68

Cases:	Pages:
Time, Incorporated v. Pape (1971) 401 U.S. 279, 91 S.Ct. 633	17
Tonini v. State Bar (1956) 46 Cal.2d 491, 297 P.2d 1	58, 59, 60, 62, 69
Townsend v. State Bar (1930) 210 Cal. 362, 291 P. 837	65, 66, 68
Utz v. State Bar (1942) 21 Cal.2d 100, 130 P.2d 277	68
Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal. Rptr. 829, 522 P.2d 5	7, 57, 60, 61, 63, 64
California Constitution:	
Cal.Const., art. 6, §6	1
Cal.Const., art. 6, §8	1
Cal.Const., art. 6, §9	1
California Business & Professions Code:	
Cal.Bus. & Prof. Code §6001	2
Cal.Bus. & Prof. Code §6008	2
Cal.Bus. & Prof. Code §6008.1	2
Cal.Bus. & Prof. Code §6008.2	2
Cal.Bus. & Prof. Code §§ 6011-6013.5	4

	Pages:
California Business & Professions Code:	
Cal.Bus. & Prof. Code §§6076-6077	5
Cal.Bus. & Prof. Code §6140	4
Cal.Bus. & Prof. Code §§6150-6154	54
California Rules of Professional Conduct:	
Cal. Rules of Professional Conduct, former rule 2 (204 Cal., at p. xci)	6
Cal. Rules of Professional Conduct, rule 2-101	6, 9
Cal. Rules of Professional Conduct, rule 2-102	9
Cal. Rules of Professional Conduct, rule 2-103(A)(5)	9
Cal. Rules of Professional Conduct, rule 2-103(A)(6)	9
Cal. Rules of Professional Conduct, rule 2-103(A)(7)	9
Cal. Rules of Professional Conduct, rule 2-104(C)	7
Cal. Rules of Professional Conduct, Rule 2-104(D)	7

	Pages:
California Rules of Professional Conduct:	
Cal. Rules of Professional Conduct, Rule 2-104(E)	7
Cal. Rules of Professional Conduct, Rule 2-104(F)	7
Cal. Rules of Professional Conduct, rule 2-106(1)	9
Cal. Rules of Professional Conduct, rule 2-106(4)	9
Cal. Rules of Professional Conduct, proposed rule 2-101(A)	6
Cal. Rules of Professional Conduct, proposed interim rule 2-101(A)	6
Federal Regulations:	
37 Fed.Reg. 22937	76
Miscellaneous:	
The Direct Selling Industry: an Empirical Study (1969) 16 U.C.L.A. L.Rev. 883	76
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Miscellaneous:	Pages:
Hart, John W., Ambulance Chasing (1931) 6 St.B.J. 79	53
Reasons and Rosenzweig, Auto Accident Victims, Aliens Steered to Ring by Mexican Consulate (3-22-74), L.A. Times	70
Reasons and Rosenzweig, To Mask Illegal Activities Ring Used Hospital Charity (3-19-74) L.A. Times	69
Reasons and Rosenzweig, Profitable Sideline Ring Wrote Medical Reports to Back Claims (3-21-74) L.A. Times	69-70
Reasons and Rosenzweig, Promises of Windfall Settlement, Ring Preyed on Accident Victims in Barrios (3-20-74) L.A. Times	69
Webb, Joseph J., A Message From the President - Rules of Professional Conduct (1928) 2 St.B.J. 207	53

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

BRIEF FOR AMICUS CURIAE THE STATE BAR OF CALIFORNIA

INTEREST OF AMICUS CURIAE*

A. Nature of Amicus Curiae

Amicus curiae The State Bar of California (hereinafter "California Bar") is a public corporation which is, under California law, a component of the judicial branch of the state's government.

As such, the California Bar performs essential state governmental functions, including serving as an administrative arm of the Supreme Court of the State of California (hereinafter "California Supreme Court") in attorney admission, discipline and reinstatement matters. Cal.Const., art. 6, §§9, 6, 8; Cal.Bus.

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* The parties to this appeal have consented to the filing of an amicus curiae brief by The State Bar of California. Letters evidencing their consent are on file in the office of the Clerk of this Court.

& Prof. Code, §§6001, 6008, 6008.1, 6008.2; Emslie v. State Bar (1974) 11 Cal.3d 210, 224 [13], 113 Cal.Rptr. 175, 520 P.2d 991; Brotsky v. State Bar (1962) 57 Cal.2d 287, 301 [12, 13], 19 Cal.Rptr. 153, 368 P.2d 697.

With regard to matters of attorney discipline alone, the California Bar operates an elaborate disciplinary court system for the California Supreme Court, at no cost to either the court or the public at large.

This disciplinary system is used extensively. The California Bar receives and investigates over 5,000 disciplinary complaints against California attorneys

each year.*

The annual cost of this disciplinary system is in excess of $1.5 million. This cost is borne solely by the more than

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* For example, a survey of disciplinary matters pending before the California Bar on a single day (February 6, 1975) revealed the following:

Disciplinary Matters Pending	Number
At staff level	1,338
At preliminary hearing level	286
At trial hearing level	219
At disciplinary board level	69
TOTAL	1,921

A similar survey of disciplinary matters pending before the California Supreme Court on a comparable single day (January 7, 1975) revealed the following:

Disciplinary Matters Pending	Number
Proceedings originated by State Bar	43
Proceedings resulting from convictions of crimes	58
Resignations with charges pending	4
Revocation of license	1
Revocation of probation	1
TOTAL	107

54,000 members of the California Bar.*

The California Bar is directed and managed by a Board of Governors (hereinafter "Board"), the members of which are public officers.** Chronicle Publishing Company v. Superior Court (1960) 54 Cal.2d 548, 566 [8], 7 Cal.Rptr. 109, 354 P.2d 637.

The Board is specifically empowered by state law "[w]ith the approval of the

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* The funds are derived entirely from membership fees. The state legislature has placed a ceiling on the California Bar's membership fees (Cal.Bus. & Prof. Code, §6140), and the California Bar has no power to additionally assess its members for any purpose. In recent years the California Bar's membership fees have been at the maximums allowed by the state legislature.

** The Board consists of 15 attorney members elected from geographic districts by California attorneys, and 6 nonattorney members appointed from the state at large by the Governor. Cal.Bus. & Prof. Code, §§6011-6013.5.

[California] Supreme Court, . . . [to] formulate and enforce rules of professional conduct for all members of the bar in the State." Cal.Bus. & Prof. Code, §6076. The rules thus formulated, however, are not binding until approved by the California Supreme Court. Cal.Bus. & Prof. Code, §§6076-6077. Upon such approval, they become rules of that court. Barton v. State Bar (1930) 209 Cal. 677, 680 [2], 289 P. 818.

B. California's Rules Protect the Public From the Risks of Harm Inherent in Ambulance Chasing and Direct Solicitation by Attorneys for Their Own Purposes

Ever since California's Rules of Professional Conduct were first formulated by the Board and approved by the California Supreme Court in 1928, they have prohibited attorneys from soliciting professional employment for their own purposes, either

directly themselves or indirectly through lay intermediaries such as ambulance chasers. See Cal. Rules of Prof. Conduct, former rule 2 (204 Cal., at p. xci); present rule 2-101 (14 Cal.3d, at p. Rules 1); proposed rule 2-101(A); proposed interim rule 2-101(A).*

This fundamental prohibition protects the public from situations which present risks of undue influence, overreaching, misrepresentation and conflicts of interest between attorneys and the persons they seek to represent. See, e.g., Geffen v. State Bar (1975) 14 Cal.3d 843, 122 Cal. Rptr. 865, 537 P.2d 1225; Younger v. State

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* The proposed rules appear at Appendices A and B to the Brief for Amicus Curiae The State Bar of California recently filed in In re Smith (Docket No. 77-56) [hereinafter "Smith"].

Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5; see also, Argument, infra.

But the foregoing California prohibition is not absolute.

It coexists with other provisions that expressly authorize certain collective activity undertaken to obtain meaningful access to the courts and provide breathing room for this First Amendment right. For example, the rules not only permit, but also foster the development of lawyer reference services (rule 2-104(C)), group legal services (rule 2-104(D)), prepaid legal services (rule 2-104(E)) and legal aid programs (rule 2-104(F)). See, generally, discussion in Brief for Amicus Curiae The State Bar of California in the Smith case.

In addition, almost a year before this Court's decision in Bates v. State Bar of

Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691 (hereinafter "Bates"), the Board proposed to the California Supreme Court extensive -- and experimental -- revisions to California's Rules of Professional Conduct designed to permit greater flow of information about what attorneys do and cost. These proposed revisions would permit information about many California attorneys to be published in expanded, nontraditional and readily-available law lists, legal directories and telephone books, with appropriate prescriptions concerning form and content to foster comparisons and prevent deception. (The proposed rules appear at Appendix A to the Brief for Amicus Curiae The State Bar of California in the Smith case.)

These proposed new California rules were filed in the California Supreme Court

on August 26, 1976 under the title and number, In the Matter of the Proposed Repeal of Rule 2-106, Rules of Professional Conduct, Cal.Sup.Ct. Bar Misc. No. 3922.

Shortly after this Court's decision in Bates, the Board embarked on a review of its earlier proposal in light of Bates. The Board also proposed that until that review can be completed and the result acted upon, the California Supreme Court repeal the existing California Rules of Professional Conduct regarding advertising by attorneys (rules 2-101, 2-102, 2-103(A)(5),(A)(6), (A)(7), 2-106(1) and 2-106(4) [see 14 Cal.3d, at pp. Rules 1-5 and 13-14]) and adopt instead an interim rule containing two fundamental prohibitions: one against false and misleading advertising; and the other against attorneys soliciting professional employment for their own purposes, either

directly themselves or indirectly through lay intermediaries such as ambulance chasers. (The proposed interim rule appears at Appendix B to the Brief for Amicus Curiae The State Bar of California in the Smith case.)

The proposed interim California rule was filed in the California Supreme Court on August 17, 1977 under the same title and number as the Board's prior proposal. It is still pending before the court.

SUMMARY OF ARGUMENT

As is indicated above, California's prohibition against attorneys soliciting professional employment for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers, protects the public from situations which present risks of undue influence, overreaching, misrepresentation and conflicts of interest between attorneys and the persons they seek to represent. See, supra, pp. 5-7; see also, Argument, infra.

The protection thus afforded California citizens would be seriously impaired or abolished should this Court fail to affirm the action of the Supreme Court of Ohio (hereinafter "Ohio Supreme Court") in the Ohralik case.

The California Bar strongly believes that the prohibition against solicitation by attorneys is crucial to not only protecting the public from risks of harm, but also the creation of attorney-client relationships and the maintenance of the public's confidence in the system of administration of justice in this country.

Consistent with its strong belief in the necessity for the prohibition against solicitation, the California Bar, in proposing amendments to California's Rules of Professional Conduct so as to permit advertising by lawyers, has not eliminated the fundamental prohibition against attorneys soliciting professional employment for their own purposes.

To advertise availability in the newspapers so as to help interested persons locate appropriate attorneys for perceived legal problems is one thing; the reader can prepare and choose whether or not to initiate contact and, if so, with whom.

But it is a wholly different thing to allow attorneys to focus all of their oral advocacy skills upon persons, often in home or hospital, so as to at once create or heighten an apparent need for legal representation and at the same time sell that particular attorney's services to meet the need. The person in such a situation is often emotionally distraught, has neither prepared for nor initiated the contact, and may have great difficulty in terminating the contact without agreeing to retain the attorney.

Should this Court choose to decide

the Ohralik case on the present state of the record, the California Bar respectfully urges the Court to recognize that the balance of competing interests should be struck in favor of the prohibition against attorneys soliciting professional employment for their own purposes.

Since the opinion below was handed down before this Court's decision in Bates and omits any discussion of the Ohio Supreme Court's weighing of Ohralik's First Amendment claim vis-a-vis the strong public interests served by the prohibition against solicitation, this Court may wish to remand this case to the Ohio Supreme Court for such discussion. See Bigelow v. Virginia (1975) 421 U.S. 809, 826, 95 S.Ct. 2222, 2235; compare 48 Ohio St.2d, at pp. 219-220, 357 N.E.2d, at p. 1098, Juris.Stmt., pp. 3a-4a.

Nonetheless, the record in this case reveals that Ohralik engaged in misconduct which gave rise to situations presenting precisely the kinds of risks to the public and the system of administration of justice that the prohibition was designed to prevent. See Statement of Facts Revealed by the Record, infra.

It is well settled that in First Amendment cases such as this one, this Court has a duty to decide the facts for itself. See, e.g., Jacobellis v. State of Ohio (1964) 378 U.S. 184, 189-190, 84 S.Ct. 1676, 1678-1679. In light of this Court's duty and the risks of harm revealed by the record herein, the Court may wish to proceed despite the Ohio Supreme Court's omission. If this Court does proceed, it should preserve the protections afforded citizens and the administration of justice

by the prohibition against attorneys soliciting professional employment for their own purposes.

SUMMARY OF FACTS REVEALED BY THE RECORD

In its opinion below, the Ohio Supreme Court summarized the facts of this case only briefly. In addition, the parties to this appeal have presented to this Court conflicting and somewhat confusing versions of the pertinent facts. For the convenience of this Court, these versions are tabulated side-by-side in Appendix A, infra.

In Time, Incorporated v. Pape (1971) 401 U.S. 279, 284, 91 S.Ct. 633, 636-637, this Court requoted "the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.'" (Emp. added, citations omitted.) See also, e.g., Jacobellis v. State of Ohio (1964) 378 U.S. 184, 189-190, 84 S.Ct. 1676, 1678-1679.

To assist this Court in such reexamination, the California Bar presents the following detailed summary of the facts revealed by the record:

A. Carol and Wanda Were Seriously Injured in an Automobile Accident

Early in the morning of February 2, 1974, Carol McClintock (hereinafter "Carol") was driving Wanda Lou Holbert (hereinafter "Wanda") home from a dance when a vehicle driven by a drunk driver crossed the centerline and struck their car.

Carol suffered two broken legs, face lacerations, contusions and eye injuries (App. 44a*) and remained in the hospital in traction for six weeks (App. 30a). Wanda suffered head injuries, cracked ribs and a broken pelvis (App. 121a).

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* References to "App ___" are to the printed Appendix. References to "J.S. App. ___" are to the appendices printed at the end of the Jurisdictional Statement. References to "Tr. ___" are to the transcript of the hearings before the hearing panel of the Ohio Board of Commissioners on Grievances and Discipline which have not been included in the printed Appendix.

Both Carol and Wanda lived in Montville, Ohio. Both of the girls were eighteen years old, Carol having celebrated her birthday just three weeks earlier (App. 110a). Carol had recently graduated from high school but was unemployed, having been temporarily laid off her job (App. 100a). Wanda was attending night school to complete the last two or three units needed to graduate and working thirty hours a week at a nearby rest home (App. 122a, 126a).

B. Ohralik Hardly Knew Carol and Wanda Prior to the Accident

Appellant Albert Ohralik (hereinafter "Ohralik") also resided in Montville, but he maintained his principal office for the practice of law in Cleveland, Ohio.*

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* Notwithstanding the assertion by Ohralik's counsel that he had been a "prominent and esteemed attorney" in Montville for many years preceding these events (Brief for Appellant [hereinafter "B.A."], p. 9), the record contains no evidence supporting this claim.

Carol and Ohralik recognized each other. They had often met at the post office when picking up mail. But the extent of their acquaintanceship is sharply disputed.

Carol testified that she did not know that Ohralik was a lawyer and that nothing personal was ever mentioned in their exchanges of greetings at the post office (App. 38a). Ohralik claimed that they talked about "what was new in the life of a teenager" (App. 50a). He didn't, however, know that Carol was one of eight children (App. 110a). Although Carol knew that her parents had purchased an automobile from Ohralik when she was twelve or thirteen years old (App. 36a), they did not belong to the same organizations or church, and they did not meet socially (App. 71a).

Ohralik contends (B.A. 9) that Carol

must have known he was an attorney because that fact was reflected on campaign literature he had used in past unsuccessful elections, and because he had an "attorney at law" sign in front of his home (App. 72a).

However, there is no evidence in the record that Carol, who was too young to vote in those elections, had ever seen any of that literature, or that she had ever gone past Ohralik's house.

Ohralik's relationship with Wanda prior to the accident was even more tenuous.

He recognized her face from chance meetings at the post office, but he did not know her name (App. 78a), and he couldn't recall whether they had ever spoken (App. 68a). Ohralik admitted that prior to visiting Wanda after the accident, he did not know the family (App. 80a).

It is undisputed that Ohralik was not related in any way to either of the girls and that neither of them had ever been his client. The Disciplinary Board found that they were, if anything, casual acquaintances of Ohralik's (J.S.App. 1a, 12a).

C. Ohralik Solicited Carol

1. Ohralik First Telephoned Carol's Home

On the morning of February 13, 1974 Ohralik telephoned the McClintock residence for the ostensible purpose of inquiring about Carol's condition* (App. 44a, 51a).

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* Ohralik claimed to have first learned of the accident from the postmaster's brother on February 4 or 5 (App. 49a). However, he also testified that, despite his concern for a woman he considered his "friend" (App. 89a), he made no effort to contact Carol or her family and did not discuss the accident with anyone (App.69a, 70a) until February 13, when the postmaster's brother "reminded" him of Carol's injury (App. 50a).

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Descriptions of this conversation by Mrs. McClintock, on the one hand, and Ohralik, on the other, are strikingly different.

Mrs. McClintock testified that Ohralik asked about Carol's injuries and "wanted to know if he could go and see her, he might be of some help to her" (App. 44a). He ascertained that the McClintocks (not Carol) owned the car, that they had insurance on it and that they had not yet retained an attorney, although one had been

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While Ohralik took no action to convey his asserted concern for over a week following the accident, by 1:00 p.m. on the 13th he had (1) discussed with his brother whether they should visit Carol, (2) telephoned Mrs. McClintock, (3) visited Mr. and Mrs. McClintock in their home, (4) driven one-half hour to Painesville, (5) visited Carol in the hospital, (6) driven back to Montville, (7) stopped to take photographs of the accident scene, (8) stopped again to pick up his tape recorder and (9) returned to the McClintocks' residence. (See infra, pp. 26-37).

recommended to them by the hospital administrator. Mrs. McClintock also told Ohralik that because Carol was 18, the decision whether to prosecute a claim would be up to her. Ohralik told Mrs. McClintock that he was experienced in insurance matters and that he could take care of everything for them, and he asked if he could come to the McClintocks' residence to discuss the matter (App. 44a-46a).

Although Ohralik agrees that the subject of lawyers arose, he contended that Mrs. McClintock first mentioned it. He also testified that she asked whether he was going to see Carol that day, and when he responded affirmatively, she asked, "would you please stop at our house before you go" (App. 51a).

2. Ohralik Claims to Have Visited Carol's Parents Before Going to the Hospital

Ohralik unequivocally asserts that he went to the McClintocks' residence twice on February 13th. According to Ohralik, the so-called "first" visit occurred at approximately 10:00 a.m., in response to Mrs. McClintock's request (App. 51a). Ohralik testified that during this meeting the McClintocks expressed concern that Wanda might sue them, and he allayed these fears by explaining the Ohio guest statute (App. 52a). According to Ohralik, the "second" visit occurred about 1:00 p.m., after he had met with Carol at the hospital, and he tape recorded this "second" visit unbeknownst to the McClintocks (see App. 92a-117a).*

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* Ohralik secretly tape recorded two

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conversations, one with Carol's parents following his visit with Carol in the hospital, and the other with Wanda.

Counsel for Ohralik contends that "No question was raised . . . reflecting on the authenticity, the accuracy or the virtual completeness of the tapes" (B.A. 7). However, this assertion is not supported by the record.

The tape of the conversation with Mr. and Mrs. McClintock, on its face, reflects several omissions. (See detailed discussion, infra, footnote* pp. 38-39.)

In addition, Wanda testified that the transcription of her conversation with Ohralik was incorrect in that it omitted his first words to her - - that he represented Carol and would like to talk about representing Wanda as well. (See detailed discussion, infra, pp. 42-43.)

According to Ohralik, both recordings were made on one side of a cassette containing sixty minutes of recording time per side (App. 88a-89a). Although he had previously testified that he had not altered the tapes in any way (App. 56a), on further examination Ohralik admitted that he had made a recording from one side of the original tape onto a second tape, and then from the second tape to the reverse side of the original tape, so that both sides of the original tape contained the same material (App. 87a-88a). At the time of the hearing, Ohralik was unable to identify which side of the original tape contained the original recording (App. 83a). Nor did Ohralik give any reason for having copied the original tape. In fact, he stated that

(footnote continued on next page)

However, despite counsel's assertion that it is "clear" the "first" visit occurred (B.A. 15), there is no evidentiary support for this in the record other than Ohralik's own testimony.

Ohralik's account is flatly contradicted by Mrs. McClintock, who consistently testified that they met only once (Tr. 151, 169, 170; App. 48a).

She stated that this meeting occurred shortly after noon and a few hours after Ohralik's telephone call (Tr. 166). She

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he had never made copies of tapes in any other matter (App. 84a).

In evaluating Ohralik's contentions regarding these tapes, it must be remembered that he alone knew that the conversations were being recorded, that he operated the start and stop controls and that the tapes remained in his sole possession until he delivered them to the hearing panel over one year after they were made (App. 56a).

testified that during this meeting Ohralik reviewed their auto insurance policy, discussed the Ohio guest statute and received directions to Wanda's (App. 48a). She was also certain that Ohralik went directly to Wanda's after leaving the McClintocks' home because she remembered watching from the window as he walked across the street to Wanda's (Tr. 168). Mrs. McClintock's description of this one meeting with Ohralik matches the transcribed conversation of Ohralik's "second" meeting (see App. 92a-117a).

The hearing panel of the Ohio Board of Commissioners on Grievances and Discipline, which heard the testimony and was in the best position to evaluate the credibility of the witnesses, resolved the dispute against Ohralik and found that the "first" meeting alleged by Ohralik had not, in fact, occurred (J.S.App. 12a).

3. Ohralik Visited Carol at the Hospital

After the telephone conversation with Ohralik, Mrs. McClintock telephoned Carol to advise her that Ohralik might be coming to see her regarding whether she needed an attorney (App. 41a, 47a). She did not recommend his services, but told her daughter that, since she was 18, the decision would be up to her.

Ohralik testified that his sole purpose in going to the hospital was "[t]o make a social call, to chat" (App. 52a).

Wanda and Carol had shared a room in the hospital, but Wanda was being discharged that morning at about the time Ohralik arrived (App. 127a). He later told Wanda that he had seen her family at the hospital but had hidden from them. According to the transcript of that tape recorded conversation, Ohralik said (App. 129a):

> "I was going to take pictures there but I was waiting for them to leave. I didn't want them to see me. I was sitting around waiting for them to leave. I don't know if they noticed that. I had a camera in my pocket. When they left I took about 8 pictures of Carol and all of the traction."*
>
> (Emp. added.)

During Ohralik's conversation with Carol, which they both agree lasted approximately 45 minutes (App. 32a, 53a), Carol lay in her hospital bed, in traction and

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* The reason Ohralik did not want Wanda's parents to see him is not disclosed by the record.

With regard to the pictures Ohralik took of Carol, he later told Carol's parents that he took them because he thought they would be useful if there was any "argument" (App. 92a).

heavily trussed.* No other person was present, and Ohralik did not tape record the conversation.

Carol's and Ohralik's accounts of this meeting differ greatly.

Carol testified (App. 31a):

> "He came into the hospital and told me that he was a lawyer and that he had talked to my mom and dad; and they called me and said that he had been to the house and that he wanted to come up and talk to me; and that he came up - well, he came up to the hospital and said that he was a lawyer and that he had heard at the Post Office that I had been in a car accident and that I would need a lawyer.
>
> "He said that my bed was by a window overlooking the emergency entrance to the hospital when the ambulances came in, and that he had cards with him, and he said that I could chase ambulances for him, and he gave me some cards."
>
> (Emp. added.)

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* In her letter discharging Ohralik, Carol also stated that she was on medication at the time of this visit (App. 35a). There is no evidence in the record to contradict this, and Ohralik admitted he did not inquire at the time of his visit whether Carol had taken any medication (App. 74a).

She also testified that Ohralik read a typed retainer contract to her, but that she refused to sign it, indicating she wanted to discuss the matter with her parents before making any decision (App. 31a, 32a).*

Ohralik claims he told Carol it was a "mess how a drunk driver could cause her those problems"** (App. 53a), and that he commented on the butterflies with which she had decorated her room. He also "commiserated with her on how she was

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* Subsequently, on February 15, 1974, Carol did sign the contract (App. 32a, 59a).

** The source of Ohralik's knowledge that the other driver had been drinking is not revealed by the record.

trussed up with pulleys and how confining it was, and then she brought up in the conversation that some hospital administrator was urging a lawyer upon her, and I chuckled and I said 'Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal'" (App. 53a). Finally, he testified that Carol asked him to tell her parents to call on her that evening to discuss the matter further (App. 54a).*

They may have discussed more than Ohralik relates. The transcripts of the two tape recorded conversations reveal that, by the afternoon of the 13th, Ohralik had

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* Carol did not admit making such a request, and it is inconsistent with the uncontroverted fact that she telephoned her parents shortly after Ohralik left her hospital room to ask their advice about him (App. 46a, 47a, 108a).

considerable knowledge about the accident, but he denies having done any investigation prior to that day (App. 85a).

For example, in his subsequent conversation with the McClintocks,* Ohralik indicated he had spoken with Carol about the location of the car wreckage (App. 92a) and also about Carol's having been laid off her job (App. 100a). The tape reflects that he also knew the general circumstances of the accident (App. 105a), that the other driver was in the same hospital (App. 93a), that he was uninsured (App. 95a), that the owner of the car was named Bennett (App. 99a), that Wanda lived near the McClintocks (App. 95a), and that Ohralik had had a conversation with Wanda's relative (App. 95a). The transcript also

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* See, infra, pp. 38-41.

corroborates Carol's testimony that Ohralik asked to be her attorney (App. 93a).

The taped conversation with Wanda* reveals that Ohralik knew the girls had been returning from a dance and that the accident occurred at about 2:00 a.m. (App. 119a).

In addition, Ohralik was sufficiently acquainted with the facts that he was able to locate and photograph the accident scene, as well as make the one-half hour drive from the hospital to the McClintocks' residence (stopping at his own house to pick up his tape recorder) in only one hour (App. 86a, 90a).

Although Carol told Ohralik that she wanted to talk to her parents before making any decision, he left her with the impression that he would "get the insurance stuff

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* See, infra, pp. 41-46.

and papers and find out what kind of coverage of insurance that there was, and that he would take care of everything, and let me know what was going on" (App. 32a).

4. Ohralik Then Returned to the McClintocks' Home

After leaving the hospital about noon, Ohralik drove to the McClintocks' residence, stopping along the way to take photographs of the accident scene and to pick up his tape recorder at his home (App. 86a, 90a). He arrived at the McClintocks' residence about 1:00 p.m. (App. 90a).

Ohralik testified that his sole purpose in going there was to convey Carol's alleged request that her parents visit her that evening to discuss the possibility of his being retained by Carol (App. 86a, 87a). According to Ohralik, he brought his tape recorder along because "I never knew what might develop when I was over there" (App. 87a).

The conversation with the McClintocks was recorded without their knowledge. Ohralik's tape recorder was on the kitchen table hidden under his raincoat* (App. 54a).

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* Although Ohralik contends that the tape of this conversation is complete, several omissions are reflected on the face of the transcript itself.

For example, at the end of the transcript, Mrs. McClintock asked Ohralik's opinion of two attorneys whose names she had "just" mentioned to him (App. 117a), but her mentioning of the names is not on the tape. Nor is there anything on the tape which reflects the statements made by Ohralik to induce the McClintocks to show him their insurance policy and to discuss the matter in detail prior to any confirmation that Carol had decided to retain his services. Finally, when Ohralik told the McClintocks that Carol had asked him to ask them to visit her, he went on to say "but Mr. McClintock thinks that she phoned you folks since then" (App. 108a). The conversation between Mr. McClintock and Ohralik conveying this information is also absent from the tape.

Ohralik himself impliedly raised a question regarding the completeness of the tape when he testified that the tape

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The transcript of the tape recording reveals that Ohralik did not learn, until nearly two-thirds of the conversation was over, that Carol had decided to retain him. Prior to that time (and thus prior to his knowledge that an attorney-client relationship had been created), Ohralik examined the McClintock's insurance policy (App. 93a), discussed the Ohio guest statute (App. 96a), opined that Wanda's family could not successfully sue the McClintocks (App. 104a), explained the uninsured motorist provision of the policy (App. 99a) and discussed in general the process of filing and negotiating a claim. He also suggested speaking with Wanda, to "calm her down" if she was

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contained all of the conversation "that pertains to the discussion accident [sic]" (App. 55a).

See also the general discussion of the tapes, <u>supra</u>, fn.* at p. 26.

thinking of suing the McClintocks (App. 97a). Finally, he reviewed the circumstances of the accident and got the names of all the insurance company agents and adjusters who had contacted Carol or the McClintocks (App. 107a).

Only after having gotten all this information from the McClintocks, did Ohralik (a) state his purpose in visiting and (b) learn that he had been retained.*

This portion of the conversation was transcribed as follows (App. 108a):

> "Al [Ohralik]: Mrs. McClintock, Carol had asked me to ask you folks to visit her tonight to talk with her, but Mr. McClintock thinks that she phoned you folks since then.

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* The balance of the conversation contains little of substance, and is devoted mainly to a discussion of prior accidents which the McClintocks' children had had (App. 108a-117a).

> "Mrs. [McClintock]: Yes she did.
>
> "Al [Ohralik]: I see.
>
> "Mrs. [McClintock]: She said tell you to go ahead with it.
>
> "Al [Ohralik]: All right, fine."

D. Ohralik Solicited Wanda at Her Home Immediately After Leaving the McClintocks

Upon leaving the McClintocks' home, Ohralik went directly to see Wanda.

When he arrived at Wanda's home, it was approximately 1:50 p.m., and Wanda had been home from the hospital for a little more than 2 hours (App. 127a). She was recovering from injuries which included cracked ribs and a broken pelvis, and she could walk only with the assistance of crutches (App. 121a).*

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* She told Ohralik that she was still in considerable pain (App. 130a).

The door was answered by Wanda's brother (App. 10a).

There are two different versions of what happened next.

Wanda testified that (App. 21a):

> "Mr. Ohralik stepped inside the house and told me who he was and that he was representing [Carol] as her attorney, . . . and that he would also like to talk to me about it and represent me as my attorney."

See also App. 14a.

Ohralik denied Wanda's account. He claimed that he said nothing but what is reflected on the recording (except perhaps "goodbye") (App. 58a-59a), that he surreptitiously made of his conversation with Wanda. But the recording does not reflect Ohralik's arrival at the home, and he did not explain how he, an admitted stranger to the family (App. 80a), gained access to the home, obtained Wanda's consent to talk with him, and looked for a

"convenient" place to sit (trying the sofa before deciding on the dining room table) - all without speaking a word (App. 58a).

In any event, Wanda consented to talk with Ohralik.

Wanda's mother was not at home when Ohralik called, and no other adult was present during his conversation with Wanda, although several other people were in the house.

Ohralik's conversation with Wanda was tape recorded by him without Wanda's knowledge.*

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* A transcript of the tape recording appears at App. 118a, et seq.

Wanda testified that this transcript was incomplete because it did not reflect Ohralik's first words to her. She further testified that about ten unrecorded minutes of conversation elapsed between Ohralik's first words to her and the first statement on the tape recording (App. 20a).

See also the general discussion regarding the tape recordings, supra, fn.* at p. 26.

Ohralik's first tape recorded statement to Wanda contains, in light of his own testimony, at least two patent misrepresentations. He told Wanda (App. 118a):

> "We . . . ah they asked me to go and talk with Carol. They said that this drunk didn't have any insurance. No! Well it's not that bad, see . . . Of course they've hired me as their lawyer. I'm Carol's lawyer now."
>
> (Emp. added.)

("They" apparently refers to Mr. and Mr. McClintock.)

But it was Ohralik who suggested to the McClintocks that he meet with Carol, and Ohralik has consistently asserted that he was hired by Carol, not by her parents (App. 54a).

Ohralik followed these misrepresentations by explaining to Wanda the uninsured motorist provision in the McClintock's policy. He concluded by giving her "a little tip" that she had "a good claim, see, for up to

$12,500.00" (App. 119a).

After ascertaining that Wanda was 18 years old, Ohralik asked her four or five questions regarding the circumstances of the accident. These questions demonstrated his considerable knowledge of the circumstances, including the fact that the girls were on their way home from a dance. Wanda supplied no information, merely confirming the information contained in his questions. She did tell him she had hit her head on the dash and had seen nothing of the accident (App. 120a).

Ohralik then volunteered to represent Wanda. He told her it wouldn't cost her anything because he would be paid one-third of the recovery. He told her "all you'd have to do is tell me its O.K. and I would represent you if you want." She replied O.K. (App. 120a).

He then wrote down her name (which he misspelled), reaffirmed that she was 18 and asked questions regarding her parents and her employment.

Ohralik repeatedly told Wanda not to speak to anyone, particularly insurance adjusters, about the accident; and he assured her that he would be able to get a large recovery for her, partly by describing his success in a recent case (App. 127a).

E. Wanda Subsequently Attempted to Discharge Ohralik

The next morning Ohralik telephoned Wanda's home (App. 23a).

Wanda's mother, a widow with eleven children, answered the telephone. She told Ohralik in no uncertain terms that they had decided not to sue anyone and that his services as an attorney were not desired (App. 23a). Ohralik responded that Wanda was a competent adult and could speak for

herself.* Wanda's mother reiterated that they did not want to sue and did not want Mr. Ohralik for an attorney.

At that point in the conversation, according to Wanda's mother, Ohralik told her: "[D]id you know you could sue McClintocks." When Wanda's mother again replied they didn't want to sue anyone, Ohralik said, "I saw an insurance policy that McClintocks have, and you can sue them for more money than you got" (App. 24a).

These statements are directly contradictory to the assurances he had given the McClintocks the previous day that Wanda could not sue them. See, supra, p. 39.

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* Ohralik did not attempt to reconcile or explain his willingness to accept Carol's mother as Carol's authorized agent to retain him on February 13, with his refusal to accept Wanda's mother as Wanda's authorized agent to discharge him on February 14.

Ohralik denied making these statements, but he did admit to giving Wanda's mother a "lot of free advice" that "she could work with . . . herself" (App. 81a).

Ohralik never attempted to telephone Wanda again. But on February 28, he sent to her, by mail, a written retainer agreement and medical information release forms. She did not sign or return them (App. 17a).

Subsequently, on March 14, 1974, Wanda wrote to Ohralik stating, "I do not wish to sue anyone so, would you please contact anyone that you informed and tell them you are not my attorney, that is if you have told anyone. Thank you." (App. 16a-17a).

On February 13th, immediately after seeing Wanda, Ohralik had written to the insurance company asserting that he represented both girls (App. 85a). Despite Wanda's request in her letter terminating his employ-

ment, Ohralik refused to advise the insurance company that he no longer represented Wanda.

Instead, he asserted that he had a valid contract and was entitled to payment in excess of $2,000 (App. 26a-27a). The insurance company had indicated to Wanda that it would honor her claim against the policy, but it refused to release the funds to her until the matter of Ohralik's claimed fee had been resolved (App. 26a). Wanda was compelled to hire another attorney to resolve the matter (App. 19a), and payment to her was delayed by several months (App. 26a-27a).*

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* Ohralik did not express concern over this delay, despite his knowledge from his meeting with Wanda that Wanda's mother had signed a confession of judgment in favor of the hospital to secure payment of the hospital bills (App. 124a).

Ohralik continued to assert, at the time of the hearing, that he had a valid and enforceable agreement with Wanda, but he testified that he would abandon his claim against her because of his belief that an ethical question arises "if a contract has its origin in a controversy" (Tr. 256). However, four days after volunteering this testimony, Ohralik sued Wanda for the full sum of $2,466.66 which he claimed was due him. See Motion to Dismiss, p. 9.

F. Carol Also Attempted to Discharge Ohralik

Carol testified that she became dissatisfied with Ohralik's services because she was unable to contact him after being discharged from the hospital. Finally, despite her body cast, she had to go to his home unannounced in order to see him. When she did so, he displayed a callous disregard

for her situation (App. 33a-34a).

She thereupon retained new counsel and discharged Ohralik by certified letter on April 12 (App. 34a-35a). Despite her statement in the discharge letter that she had been under the influence of drugs when he visited her in the hospital (App. 35a), Ohralik adamantly maintained that he had a valid and binding contract with Carol, and insisted that it be enforced (App. 35a). He subsequently sued her and accepted a settlement for the full amount of $4,166.66 (App. 42a). Carol also incurred fees of $900 for her new attorney (App. 42a).

ARGUMENT

IN THE EVENT THIS COURT UNDERTAKES THE REQUISITE CONSTITUTIONAL BALANCING ITSELF, THE BALANCE SHOULD BE STRUCK IN FAVOR OF THE PROHIBITION AGAINST ATTORNEYS SOLICITING PROFESSIONAL EMPLOYMENT FOR THEIR OWN PURPOSES

A. Introduction

The prohibition against attorneys soliciting professional employment for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers, protects the public from very real risks of harm. It also serves to foster and preserve the attorney-client relationship and to prevent serious impairment of the public's confidence in the system of administration of justice.

Unlike many other states, California has a rich body of published legislative history and court opinions* concerning the

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* For the convenience of this Court, citations to these opinions are listed in Appendix B.

public interests that led to adoption of California's prohibition and compel its continuation.

B. The California Prohibition Was Formulated by the California Bar and Approved by the California Supreme Court in Response to Strong Public Outrage at Solicitation

California's prohibition was not adopted at the urging of attorneys alone, but rather of the public at large. The rules embodying the prohibition were formulated by the California Bar and approved by the California Supreme Court in response to strong public outrage at widespread solicitation and the resultant overreaching, overcharging, underrepresentation and misrepresentation by attorneys. See, e.g., Hart, John W., Ambulance Chasing (1931) 6 Cal. State Bar J. 79-85; Webb, Joseph J., A Message From the President - Rules of Professional Conduct (1928) 2 Cal. State Bar J. 207.

The same public outrage later resulted in enactment by the California Legislature

of a criminal misdemeanor statute which complements California's Rule of Professional Conduct by outlawing ambulance chasing. Cal.Bus. & Prof. Code, §§6150-6154; see Hutchins v. Municipal Court (1976) 61 Cal.App.3d 77, 132 Cal.Rptr. 158.

In the Hutchins case, a California Court of Appeal held that an attorney could be convicted of aiding and abetting and conspiring with certain lay persons acting as runners or cappers in the solicitation of professional employment for the attorney. In doing so, the Court noted that (61 Cal. App. 3d, at pp. 85-86):

> "The legislative history of Business and Professions Code sections 6151 through 6154 goes back 45 years to the enactment of chapter 1043 of the Statutes of 1931. . . .
>
> "The 1931 legislation was a reaction to scandalous conditions which became notorious in the late 1920's arising out of 'ambulance chasing' activities of lawyers, insurance adjusters, and claim agents. In 1929 and 1930, the State Bar created a committee on ambulance chasing and set up local

> administrative committees in various cities to undertake a complete investigation of such cases and to recommend discipline of attorneys under the State Bar Act for violation of the then recently adopted rules 2 and 3 of the Rules of Professional Conduct. [4 State Bar J. 160-161 (1930); 4 State Bar J., Pt. 2, 28 (1929); 5 State Bar J. 358 (1930); 5 State Bar J., Pt. 2, 33 (1930).]
>
> "The local administrative committees investigated and made disciplinary recommendations in numerous cases. Meanwhile, the legislation which became chapter 1043 in the 1931 Legislature, Assembly Bill No. 319, was supported by the State Bar's committee on ambulance chasing. [6 State Bar J., Pt. 2, 33, 34 1931).] Upon its passage, the State Bar committee on ambulance chasing and the president of the State Bar expressed satisfaction that it would go far in helping to eliminate the problem of solicitation of business by members of the bar. [6 State Bar J. 166-167 (1931); 6 State Bar J., Pt. 2, 34 (1931).]
>
> "Subsequent to the legislation, the local administrative committee in Los Angeles remained active, and cooperated with local prosecuting authorities in investigation of more ambulance chasing activities in the mid-1930's. [Biby, Ambulance Chasers (1935) 10 State Bar J. 42; Biby, Chasing Ambulance Chasers (1936) 11 State Bar J. 97.]

"Recently attention was again drawn to this problem by a series of articles in the Los Angeles Times in March 1974, alleging an ambulance chasing ring was operating at the Los Angeles County Medical Center. The State Bar has been involved in investigation of that problem. [State Bar Reports (Apr. 1974) page 1; State Bar Reports (Oct. 1974) page 1.] According to the amicus brief submitted by the State Bar in this case, the Los Angeles County District Attorney and the Los Angeles City Attorney, at the suggestion and with the active cooperation of the State Bar, are now actively prosecuting attorneys involved in running and capping operations."

(Pertinent footnotes in brackets; other footnotes omitted.)

C. The Prohibition Protects the Public From Situations Which, by Their Very Nature, Subject the Public to Risks of Invasions of Privacy, High-Pressure Salesmanship, Undue Influence, Overreaching, Misleading and Deceptive Practices, Divided Loyalties, Inadequate Representation and Other Breaches of Fiduciary Duties

Both the California criminal misdemeanor statute and Rule of Professional Conduct have stood since their enactment to protect the

public from situations which present very real risks of harm.

In numerous cases the California Supreme Court has imposed discipline on attorneys for direct solicitation and ambulance chasing.

Analysis of the types of behavior which have warranted discipline is revealing.

Often the attorney or his associates have engaged in activities (such as hospital room attempts to sell the attorney's services) which, by their very nature, lend themselves to overreaching.*

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* See, e.g., Goldman v. State Bar (1977) 20 Cal.3d 130, fn. 6 (Counts 3 and 4) at 136-137; 141 Cal.Rptr. 447, 570 P.2d 463 (associates of attorneys offered to pay friend of deceased accident victim if he would arrange for attorney to represent victim's parents; in another count, associates contacted work supervisor of automobile accident victim); Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5 (attorney or his associate

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Even when the prospective client is not hospitalized, elements of overreaching can be present. The attorney or his associates may travel to the home of the prospective client and apply classic "foot in the door"

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frequently solicited in hospital where prospective clients were being treated; in one count, solicitation occurred day after serious injury and patient's eye was swollen shut so as not able to read retainer agreement; in another count, solicitation occurred three days after injury while prospective client was "in a lot of pain"); Honoroff v. State Bar (1958) 50 Cal.2d 202, 204-207, 323 P.2d 1003 (Los Angeles attorney and his associate traveled to Illinois to solicit clients taken from "serious condition" list of train accient); Tonini v. State Bar (1956) 46 Cal. 2d 491, 492-495, 297 P.2d 1 (solicitations by attorneys and their agents within one day of serious injuries); Roth v. State Bar (1937) 8 Cal.2d 656, 657-658, 67 P.2d 337 (two clients solicited at hospital); Fish v. State Bar (1931) 214 Cal. 215, 218 and 220, 4 P.2d 937 (solicitation by associate within one day of serious burns; solicitation in hospital by attorney); see also, McCue v. State Bar (1935) 4 Cal.2d 79, 80, 47 P.2d 268.

salesmanship.* When the prospective client is unavailable or uncooperative, the attorney or his associates may solicit from

* See, e.g., Goldman v. State Bar (1977) 20 Cal.3d 130, fn. 6 (Counts 1 and 2) at p. 136, 141 Cal.Rptr. 447, 570 P.2d 463 (associates of attorneys solicited at homes of persons injured in automobile accidents); Geffen v. State Bar (1975) 14 Cal.3d 843, 849, 122 Cal.Rptr. 865, 537 P.2d 1225 (solicitation by associates at prospective client's home; person solicited was not wearing her eyeglasses and was induced to sign retainer agreement which she believed was insurance investigation form); Tonini v. State Bar (1956) 46 Cal.2d 491, 493, 297 P.2d 1 (attorney or his associate telephoned relatives of deceased one day after the death; three days later, attorney appeared at family home); Higgins v. State Bar (1956) 46 Cal.2d 241, 243-244, 293 P.2d 241 (solicitation by two agents at parent's home one week after child's injury; return visit one week later by attorney and his associate; in another count, solicitation by two agents at parents' home day after child's injury); Fish v. State Bar (1931) 214 Cal. 215, 219, 4 P.2d 937 (solicitation by associate using "high pressure" salesmanship at home of injured woman "almost immediately" after she left hospital); Smallberg v. State Bar (1931) 212 Cal. 113, 117, 297 P. 916 (solicitation by agent and his "clerk" at home of seriously injured prospective client).

friends and relatives.* Frequently the prospective client or the relative resists the entreaties. Undaunted, the attorney or his associates make subsequent solicitations in an effort to procure clients.**

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* See, e.g., Goldman v. State Bar (1977) 20 Cal. 3d 130, fn. 6 (Counts 3 and 4) at pp. 136-137, 141 Cal.Rptr. 447, 570 P.2d 463; Younger v. State Bar (1974) 12 Cal.3d 274, 282, 113 Cal.Rptr. 829, 522 P.2d 5; Best v. State Bar (1962) 57 Cal.2d 633, 635, 21 Cal.Rptr. 589, 371 P.2d 325; Honoroff v. State Bar (1958) 50 Cal.2d 202, 206, 323 P.2d 1003; Mitton v. State Bar (1958) 49 Cal.2d 686, 688, 321 P.2d 13; Tonini v. State Bar (1956) 46 Cal.2d 491, 495, 297 P.2d 1; Ewell v. State Bar (1934) 2 Cal.2d 209, 210, 40 P.2d 264; Fish v. State Bar (1931) 214 Cal. 215, 218, 4 P.2d 937.

** See, e.g., Goldman v. State Bar (1977) 20 Cal.3d 130, fn. 6 (Counts 4-6) at p. 137, 141 Cal.Rptr. 447, 570 P.2d 463; Geffen v. State Bar (1975) 14 Cal. 3d 843, 847-852, 122 Cal.Rptr. 865, 537 P.2d 1225; Younger v. State Bar (1974) 12 Cal.3d 274, 280, 113 Cal. Rptr. 829, 522 P.2d 5; Mitton v. State Bar (1958) 49 Cal.2d 686, 688, 321 P.2d 13; Tonini v. State Bar (1956) 46 Cal.2d 491, 494, 297 P.2d 1; Higgins v. State Bar (1956) 46 Cal.2d 241, 243, 293 P.2d 241; Ewell v. State Bar (1934) 2 Cal.2d 209, 210 and 217, 40 P.2d 264; Fish v. State Bar (1931) 214 Cal. 215, 218, 4 P.2d 937.

It is common to find that the attorney or his associates have, in pursuit of legal business, engaged in misleading or deceptive practices.

The attorney or his associates may make misrepresentations to the client or to his family designed to induce employment.*

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* See, e.g., Younger v. State Bar (1974) 12 Cal.3d 274, 113 Cal.Rptr. 829, 522 P.2d 5 (misrepresentation by attorney and his associates that they had witnessed accident and had had similar injuries; other representations apparently without foundation); Best v. State Bar (1962) 57 Cal.2d 633, 636-637, 21 Cal.Rptr. 589, 371 P.2d 325 (misrepresentation by attorney to criminal defendant's family that certain charges were pending against defendant; further misrepresentation by attorney that part of attorney's fees would be paid in bribes to government officials; misrepresentation of fee arrangement); Honoroff v. State Bar (1958) 50 Cal.2d 202, 206, 323 P.2d 1003 (misrepresentation that attorney had relative injured in same accident); Mitton v. State Bar (1958) 49 Cal. 2d 686, 688-689, 321 P.2d 13 (misrepresentation by attorney that he and his associate were eyewitnesses to accident; in another count, misrepresentation by attorney that he already represented party with related claim);

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Sometimes the attorney fails to disclose relevant information to the prospective client.*

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Tonini v. State Bar (1956) 46 Cal.2d 491, 495, 297 P.2d 1 (misrepresentation of attorney's name; Penaat v. State Bar (1944) 25 Cal.2d 26, 32-33, 152 P.2d 442 (various misleading representations to prospective clients); Roth v. State Bar (1937) 8 Cal.2d 656, 657-658, 67 P.2d 337 (misrepresentation by associate that he might be relative of prospective client); Sawyer v. State Bar (1934) 220 Cal. 702, 32 P.2d 369 (establishment of front organization by attorney); Recht v. State Bar (1933) 218 Cal. 352, 353, 23 P.2d 273 (misrepresentation by attorney to prospective clients that he had been investigating trust in which they were investors).

* See, e.g., Penaat v. State Bar (1944) 25 Cal.2d 26, 34-35, 152 P.2d 442 (attorney failed to disclose to clients that they were liable to attorneys of record as well as to attorney); Richardson v. State Bar (1942) 19 Cal.2d 707, 710, 122 P.2d 889 (attorney failed to disclose that he was administrator of estate at time he sought to represent heir to same estate); Recht v. State Bar (1933) 218 Cal.352, 353, 23 P.2d 273 (attorney failed to disclose relationship with investment trust at time he solicited employment from investors therein).

The attorney often puffs his own abilities.* He may even guarantee success.**

* See, e.g., Geffen v. State Bar (1975) 14 Cal.3d 843, 850, 122 Cal.Rptr. 865, 537 P.2d 1225 (representation by associate that attorney's law firm "specialized in automobile accidents"); Younger v. State Bar (1974) 12 Cal.3d 274, 281-282, 113 Cal.Rptr. 829, 522 P.2d 5 (attorney represented that he could get more money for client than any other attorney; in another count, attorney claimed that he and his partner had handled several of "these accident cases" and had "won them all"); Ewell v. State Bar (1934) 2 Cal.2d 209, 217, 40 P.2d 264 (attorney represented to client that he "specialized" in practice of criminal law, knew "ins and outs" of criminal practice and could more adequately represent criminal defendant than a "civil" lawyer; attorney claimed he had handled forty cases and had been successful in most of them); Fish v. State Bar (1931) 214 Cal. 215, 221, 4 P.2d 937 (attorney showed prospective client $5,000 check stating it represented settlement negotiated for another client).

** See, e.g., Geffen v. State Bar (1975) 14 Cal.3d 843, 848, 122 Cal.Rptr. 865, 537 P.2d 1225 (attorney's agent told prospective client she could make at least $1,000); Younger v. State Bar (1974) 12 Cal.3d 274, 281, 113 Cal.Rptr. 829, 522 P.2d 5 (attorney represented that he would guarantee client $20,000 and a brand new car and that client would not have to work a day in her life);

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The attorney or his associates will frequently depricate the abilities of other attorneys.*

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Best v. State Bar (1962) 57 Cal.2d 633, 636, 21 Cal.Rptr. 589, 371 P.2d 325 (attorney represented that his services would assure prospective client "would either be freed or would be placed under the Youth Authority for not more than 18 months as punishment").

* See, e.g., Geffen v. State Bar (1975) 14 Cal.3d 843, 851-852, 122 Cal.Rptr. 865, 537 P.2d 1225 (attorney's associate told client that he "knew all the good personal injury attorneys and that he had never heard of [client's attorney] and therefore thought he probably was not a very good attorney"); Younger v. State Bar (1974) 12 Cal.3d 274, 280-281, 113 Cal.Rptr. 829, 522 P.2d 5 (attorney and his associate stated attorney could do more for client than client's present attorney); Ewell v. State Bar (1934) 2 Cal. 2d 209, 210 and 217, 40 P.2d 264 (attorney told client that he was "certain to go to San Quentin if he allowed his present attorney to defend him"; attorney asserted that other attorney was hardly ever seen in criminal courts); Recht v. State Bar (1933) 218 Cal.352, 353, 23 P.2d 273 (attorney claimed that no other attorney could make recovery for clients).

Another harmful aspect of direct solicitation and ambulance chasing is the influence which such practices have on the quality of legal representation that solicited clients receive and the prices that they pay for legal services.

The attorney often becomes dependent on solicited (as opposed to client-generated) employment. In turn, the attorney becomes more dependent upon the associates who feed legal business to him. Frequently the associates become the employers, and the attorney "fronts" for their business efforts.* Often

* See, e.g., Dudney v. State Bar (1931) 214 Cal. 238, 4 P.2d 770; Dahl v. State Bar (1931) 213 Cal. 160, 1 P.2d 977; Irving v. State Bar (1931) 213 Cal. 81, 1 P.2d 2; Howe v. State Bar (1931) 212 Cal. 222, 298 P.25; Smallberg v. State Bar (1931) 212 Cal. 113, 297 P. 916; Shaw v. State Bar (1931) 212 Cal. 52, 297 P. 532; Smith v. State Bar (1930) 211 Cal. 249, 294 P. 1057; Townsend v. State Bar (1930) 210 Cal. 362, 291 P. 837.

the relationship results in inadequate representation of clients' interests.*

When the prospective client shuns the solicitations, the attorney may become vindictive.**

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* See, e.g., Howe v. State Bar (1931) 212 Cal. 222, 227, 298 P. 25 (attorney commenced and dismissed actions without authority from or consulting with clients); Smallberg v. State Bar (1931) 212 Cal. 113, 116, 297 P. 916 (attorney did not meet with clients until after learning that they were dissatisfied with his services and were contemplating a change of attorneys); Shaw v. State Bar (1931) 212 Cal. 52, 55, 297 P. 532 (attorney did not come into contact with clients until time of settlement and adjustment); Smith v. State Bar (1930) 211 Cal. 249, 252-255, 294 P. 1057 (attorney did not meet with clients until complaint had been filed; settlements were negotiated by adjuster); Townsend v. State Bar (1930) 210 Cal. 362, 369, 291 P. 837 (non-lawyer prepared complaints; attorney sometimes, but not always, saw clients, and took little interest in settlements of claims).

** See, e.g., Ewell v. State Bar (1934) 2 Cal.2d 209, 219-220, 40 P.2d 264 (attorney sought to have prospective client's probation revoked when he refused attorney's services and turned informer and witness

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Solicited employment relationships also often have unfortunate financial repercussions for clients.

The attorney who is willing to pressure the unwary into accepting his representation is often also willing to mulct exorbitant fees from them.* The attorney may split

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against attorney); Smallberg v. State Bar (1931) 212 Cal. 113, 116, 297 P. 916 (attorney had court dismiss without prejudice two actions which he had filed when he learned that clients were seeking other counsel).

* See, e.g., Best v. State Bar (1962) 57 Cal.2d 633, 636-637, 21 Cal.Rptr. 589, 371 P.2d 325 ($3,000 fee charged for entry of guilty plea); Penaat v. State Bar (1944) 25 Cal.2d 26, 28, 152 P.2d 442 (attorney attempted to collect fees that were not owed him); Recht v. State Bar (1933) 218 Cal. 352, 353-354, 23 P.2d 273 (attorney collected one-third contingency fee of $500 from one client and $600 from another in action in which attorney knew that defendants were willing to make amends anyway).

legal fees with a non-lawyer.*

The attorney may also fail to make a proper accounting to the client for funds

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* See, e.g., Utz v. State Bar (1942) 21 Cal.2d 100, 108, 130 P.2d 277 (attorney split fees with heir hunter); Ring v. State Bar (1933) 218 Cal. 747, 750, 24 P.2d 821 (apparent fee-splitting with agent); Dahl v. State Bar (1931) 213 Cal. 160, 162, 1 P. 2d 977 (attorney split contingency fee with insurance adjuster); Irving v. State Bar (1931) 213 Cal. 81, 82-83, 1 P.2d 2 (insurance adjuster received percentage of settlement from which attorney was paid salary or percentage); Howe v. State Bar (1931) 212 Cal. 222, 225-226, 298 P. 25 (insurance adjuster received percentage of settlement from which attorney was paid fixed sum); Smallberg v. State Bar (1931) 212 Cal. 113, 115-116, 297 P. 916 (insurance adjuster received percentage of settlement from which attorney was paid fixed sum); Shaw v. State Bar (1931) 212 Cal. 52, 54-55, 297 P. 532 (insurance adjuster received percentage of settlement from which attorney was paid fixed sum); Smith v. State Bar (1930) 211 Cal. 249, 294 P. 1057 (insurance adjuster received percentage of settlement from which attorney was paid salary); Townsend v. State Bar (1930) 210 Cal. 362, 364, 291 P. 837 (insurance adjuster received percentage of settlement from which attorney was paid salary and fixed sum for each court appearance).

received.*

The foregoing practices, which are inherent in the solicitation of professional employment by attorneys, either directly themselves or indirectly through lay intermediaries such as ambulance chasers, are still matters of great public concern and give rise to public outrage when discovered. See, e.g., Reasons and Rosenzweig, To Mask Illegal Activities Ring Used Hospital Charity (March 19, 1974) Los Angeles Times, pp. 1-3; Reasons and Rosenzweig, Promises of Windfall Settlement, Ring Preyed on Accident Victims in Barrios (March 20, 1974) Los Angeles Times, p. 1; Reasons and Rosenzeig, Profitable Sideline, Ring Wrote Medical Reports to

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* See, e.g., Tonini v. State Bar (1956) 46 Cal.2d 491, 496, 297 P.2d 1 (attorney "on occasions" failed to make a proper accounting to his clients); Roth v. State Bar (1937) 8 Cal.2d 656, 658, 67 P.2d 337 (attorney did not pay client's share of settlement until disciplinary proceedings were commenced).

Back Claims (March 21, 1974) Los Angeles Times, Section II, p. 1; Reasons and Rosenzweig, Auto Accident Victims, Aliens Steered to Ring by Mexican Consulate (March 22, 1974) Los Angeles Times, Section II, p. 1.

D. The Ohralik Case Provides Yet Another Example of The Risks To Which The Public And The Administration of Justice Are Exposed When Attorneys Solicit Professional Employment For Their Own Purposes

Ohralik's actions in soliciting the personal injury claims of the two young girls in this case provide yet another example of the way in which members of the public are harmed when attorneys solicit professional employment for their own purposes.

The record clearly demonstrates that Ohralik took advantage of two young girls, with whom he was only slightly acquainted, at a time when they were extremely vulnerable. He bound them to retainer contracts from which they later extricated themselves

only with substantial effort and expense.

Ohralik's contacts occurred while each girl was recovering from serious bodily injuries and were unannounced, in person and out of the presence of parents or other adults.

He solicited Carol in her hospital room eleven days after the accident, while she lay in traction with two broken legs. Although she refused his requests that she sign a retainer agreement at that time, Ohralik nonetheless took photographs of her and assured her that he would take care of everything. Undaunted by Carol's refusal to retain him, Ohralik went to see Carol's parents. He induced them to show him their insurance policy and to discuss the accident in detail with him before he knew Carol had decided to retain him.

In soliciting Wanda, Ohralik literally employed classic "foot in the door"

salesmanship techniques, stepping inside the front door before stating his name and purpose. Wanda had been home from the hospital for less than three hours when Ohralik called on her. She could walk only with the assistance of crutches, and she was experiencing considerable pain.

He puffed his own abilities, claiming to the McClintocks that he was experienced in insurance matters and could take care of everything, and describing to Wanda in detail his success in a similar case.

The record also reflects several instances in which Ohralik misrepresented facts. For example, he told Wanda that the McClintocks had asked him to speak with Carol and had hired him as Carol's lawyer. These statements are patently false and are contradicted by Ohralik's own testimony. Ohralik may also have fabricated Carol's alleged request that he ask her parents to

visit her, as well as his assertion that he met with Carol's parents twice on the 13th of February.

In addition to making these affirmative misrepresentations, Ohralik, without the knowledge or consent of the people involved and at a time when there was no attorney-client relationship which would protect disclosures, tape recorded conversations with both the McClintocks and Wanda. When his clients later attempted to discharge him, Ohralik used these tapes against them by offering the tapes as evidence of his retainer agreements.

Because of Ohralik's eagerness to secure both girls as clients, he gave conflicting statements of their rights under the law. He told Wanda's mother, when she attempted to discharge him, that she could sue the McClintocks. He did not, however, mention to her the Ohio guest statute, on

which he had relied in assuring the McClintocks that Wanda's family could not successfully sue them. He also did not tell either girl that their interests could potentially conflict.

Both girls were required to retain counsel to terminate their relationships with Ohralik, and they sustained financial losses as a result. Wanda's settlement proceeds were delayed for several months while the dispute about Ohralik's fee was resolved, and four days after the disciplinary hearing, Ohralik sued Wanda for the amount he maintained was due him, despite his testimony that he would drop his claim. Carol ended up paying Ohralik the full one-third fee he demanded and, in addition, had to pay a second attorney $900 to complete the settlement process with the insurance company and to defend her in the fee action Ohralik

brought against her.

The facts revealed by the record in this case evidence Ohralik's invastions of privacy, high-pressure salesmanship, undue influence, overreaching, misleading and deceptive statements, divided loyalties, inadequate representation, breaches of fiduciary duties and vindictiveness. Such conduct is not only directly harmful to those who are subjected to it, it also impairs development of an attorney-client relationship and erodes the public's confidence in the system of administration of justice.

CONCLUSION

The dangers to the public presented by door-to-door solicitations for the sale of products and services are well documented. See, e.g., Breard v. City of Alexandria (1951) 341 U.S. 622, 71 S.Ct. 920; The Direct Selling Industry: An Empirical Study (1969) 16 U.C.L.A. L.Rev. 883; Federal Trade Commission, Cooling-Off Period for Door-to-Door Sales - Trade Regulations Rule and Statement of Basis and Purpose (1972) 37 Fed.Reg. 22933.

For example, the Federal Trade Commission summarized the problems associated with door-to-door sales as follows (37 Fed.Reg. 22937):

> "From the record in these proceedings, it is clear that the frequency and number of complaints arising out of door-to-door sales is substantial. Those involved in legal aid programs and consumer protection activities were particularly vociferous in their condemnation of the practices of some door-to-door sellers.
>
> "The complaints of consumers regarding door-to-door salesmen fall within five basic headings. These are: (1) Deception by salesmen in getting inside the door; (2) high pressure sales tactics; (3) misrepresentation as to the quality, price, or characteristics of the product; (4) high prices for low-quality merchandise; and (5) the nuisance created by the visit to the home by the uninvited salesmen."

But the dangers are even greater in the case of attorney solicitation because such solicitation also impairs formation of attorney-client relationships as well as the public's confidence in the system of administration of justice.

The establishment of a relationship of trust and confidence between client and attorney is fundamental to American jurisprudence and everywhere protected by the attorney-client privilege. But how can a client who at one moment may be skeptical of and resisting the salesmanship

tactics of an attorney suddenly, once the sale is closed and the client has signed on the dotted line of the attorney's written retainer agreement, create the relationship of complete trust and confidence that is necessary for the attorney to properly represent the client? Quite simply, the client can't shift mental gears that fast, or perhaps at all. Solicitation by attorneys for their own purposes makes establishment of proper attorney-client relationships unnecessarily difficult, if not impossible.

And the impact of this handicap goes far beyond the individual attorney-client relationship itself. It has often been observed that attorneys are officers of the court and vital to our system of administration of justice. When a client mistrusts his own attorney, it is easy for the client to mistrust the entire system.

The fact that the public becomes outraged by the abuses inherent in the solicitation process is not speculative; it has been demonstrated over the years and as recently as 1974 by the California experience (see, supra, pp. 53-70). There can be no doubt that the public's confidence in the system of administration of justice is impaired when attorneys engage in practices such as those revealed by the California experience and the record in the Ohralik case.

These then are the public interests served by the prohibition against attorneys soliciting professional employment for their own purposes: prevention of impairment of attorney-client relationships and the public's confidence in the system of administration of justice, as well as exposure of the public to situations which, by their very nature, involve risks of invasions of

privacy, high-pressure salesmanship, undue influence, overreaching, misleading and deceptive practices, divided loyalties, inadequate representation and other breaches of fiduciary duties.

Whatever First Amendment right the public may have to receive information from attorneys is not well served by allowing it to be conveyed as part of an in-person (and often in-home or in-hospital) sales pitch. Indeed, solicitation may well distort or decrease the public's information, rather than enhance it. The victim of solicitation often has no real opportunity to question the attorney's statements, or to compare the services being offered with others that may be available, or to reflect upon the final decision.

Whatever First Amendment right the attorney might conceivably have to convey

information to potential clients by in-person solicitation is considerably weakened by the fact that the attorney now has an alternative means available for conveying such information: advertising.
See Bates v. State Bar of Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691.

To advertise availability in the newspapers so as to help interested persons locate appropriate attorneys for perceived legal problems is one thing; the reader can prepare and choose whether or not to initiate contact and, if so, with whom.

But it is a wholly different thing to allow attorneys to focus all of their oral advocacy skills upon persons, often in home or hospital, so as to at once create or heighten an apparent need for legal representation and at the same time sell that particular attorney's services to meet the

need. The person in such a situation is often emotionally distraught, has neither prepared for nor initiated the contact, and may have great difficulty in terminating the contact without agreeing to retain the attorney.

The California Bar respectfully submits that when the First Amendment interests involved in the Ohralik case are properly assessed, they are far outweighed by the public interests served by the prohibition.

Solicitation by attorneys for their own purposes, either directly themselves or indirectly through lay intermediaries such as ambulance chasers, inherently does not flow "freely and cleanly." Bates v. State Bar of Arizona (1977) ___ U.S. ___, 97 S.Ct. 2691, 2709.

For the reasons stated in this brief, the California Bar respectfully urges this Court to preserve the protections afforded citizens and the system of administration of justice by the prohibition against attorneys soliciting professional employment for their own purposes.

Dated: December 20, 1977.

Respectfully submitted,

Herbert M. Rosenthal
Stuart A. Forsyth

Attorneys for Amicus Curiae
The State Bar of California

APPENDIX

Ohralik v. The Ohio State Bar Association
(U.S.Sup.Ct. Docket No. 76-1650)

THE FACTS, ACCORDING TO:

APPENDIX A

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

Albert Ohralik was admitted to the practice of law in Ohio in March 1948. He is 55 years old and resides in Montville, Ohio. His law office is in Cleveland. [p. 217]

Both Carol and Wanda were, if anything, casual acquaintances. Neither were relatives or former clients. [p. 217]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

[Note: Counsel set out in the motion the entire Ohio Supreme Court opinion. Included here are only the additional factual statements made in the motion.]

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

For many years preceding the events of 1974, appellant had been a prominent and esteemed attorney in a small township known as Montville, Ohio, maintaining a law practice both there and in Cleveland. App. 69a. He had an "attorney at law" placard in front of his Montville house, and had been active politically in the community. App. 62a, 72a. The findings of fact below (J.S. App. 1a-2a, 12a), while reflecting Carol McClintock's testimony (App. 36a) that she had not known appellant was a lawyer until he visited her in the hospital on February 13, acknowledged but did not resolve appellant's contrary testimony "that Carol must have been aware that he was a practicing lawyer because, among other things, he had been a candidate for public office and the fact was evident from his campaign literature" (J.S.App. 2a), and he "had displayed political campaign posters in his yard situated a mere mile from Carol's home" (J.S.App. 12a). [p. 9]

Moreover, since 1968, appellant had maintained a mailbox in the Montville postoffice, which he often visited twice a day to pick up his mail. On those visits, while waiting for the mail to be distributed, he frequently saw and talked to Carol McClintock - perhaps two or three times a week. App. 50a. Carol acknowledged that she had met appellant on these many occasions at the postoffice. App. 36a-38a. And the findings

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

Appellant was slightly acquainted with Carol. [p. 5]

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

In the early morning of February 13, 1974, while at the Montville, Ohio, Post Office, appellant learned from the postmaster's brother that Carol and Wanda had been involved in a serious automobile accident. [p. 217]

Appellant telephoned Carol's mother, obtained her consent to visit Carol at the hospital, and, later that day, proceeded to the hospital where Carol was undergoing treatment f - the injuries sustained in the accident. [p. 217]

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Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

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Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

below stated that she "admitted to a casual acquaintanceship with him, which began with her visits to the Montville Post Office to pi k up the family mail, and which was limited to a customary exchange of greetings on such occasions." J.S.App. 1a-2a. He had first met Carol in this fashion about four or five years prior to her 1974 accident. App. 50a. Appellant further testified that he also had met and become acquainted with Wanda Lou Holbert at these local postoffice gatherings, though he "didn't see her nearly as much" as he had seen Carol McClintock. App. 68a. [pp. 9-10]

Appellant first learned of the accident from the postmaster's brother on the 4th or 5th of February. [p. 11]

He telephoned the McClintocks, and then went to visit them. They were worried about whether Wanda's family would sue them, and appellant allayed their fears by explaining the significance of the Ohio guest statute. [pp. 14-15]

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Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

Appellant heard about the accident from the postmaster's brother when he made one of his bi-weekly trips to the post office to pick up his mail. [Tr. 177-80]. [p. 6]

Shortly after hearing about the accident he called Carol's parents. He went to see them, and then went to see Carol in the hospital. [pp. 5-6]

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Supreme Court of Ohio
Source: 48 Ohio St.2d 217

After reviewing with Carol the legal merits of her cause and the need for proper representation, appellant obtained Carol's consent to handle the claim. [p. 218]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

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Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

From the McClintocks' house, appellant drove directly to the hospital in Painesville to visit Carol, without his tape recorder. He commiserated with her on her discomfort. She brought up in the conversation that some hospital administrator was urging a lawyer upon her, and appellant said, "Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal" (App. 53a). Carol's version of this visit was that appellant came into the hospital, told her that he was a lawyer and that he had talked to her mom and dad. She had been expecting him because her parents had called to tell her he was coming. She added that appellant "said that my bed was by a window overlooking the emergency entrance to the hospital when the ambulances came in, and that he had cards with him, and he said that I could chase ambulances for him, and he gave me some cards" (App. 31a). [p. 16]

The precise manner in which the subject of appellant being retained to represent Carol arose during this hospital room visit is not revealed by the record. But the subject did arise. [p. 16]

Carol asked him to tell her parents to call on her to discuss the matter further, indicating that she wanted to talk to her parents first. [p. 16]

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

During his visit with Carol appellant advised her of her legal rights and they discussed the possibility of his retention on a one-third contingent fee basis. He then returned to the McClintock's home and was told that Carol had called to request him to represent her. Mr. Ohralik consented and began to discuss the accident with the McClintocks. [Tr. 180-90]. [p. 6]

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

After leaving the hospital, appellant drove to the home of Carol's parents, where he examined their automobile liability policy, discussed the law applicable to passenger guests, and obtained the address and directions to the home of Wanda Lou Holbert, a passenger in the automobile driven by Carol McClintock. [p. 218]

Wanda Lou was then 18 years of age. Appellant, upon being admitted to her home, advised Wanda that he represented Carol McClintock, and that he had a "tip" for her, namely: that she had a substantial legal claim for the injuries she had suffered while riding as a passenger in the automobile driven by her neighborhood friend, Carol. He further informed her he was prepared to supply her with the legal services necessary to capitalize on her claim. Respondent's representations induced Wanda to orally agree to engage him as her attorney in the matter. [p. 218]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

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Appellant secretly tape recorded his conversation with Wanda Lou Holbert by hiding his tape recorder under his coat. [p. 8]

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

Acting in part to convey Carol's request to her parents, the appellant, upon leaving the hospital, drove to the home of Carol's parents, where he examined their automobile liability policy, discussed the law applicable to passenger guests, and obtained the address and directions to the home of Wanda Lou Holbert, a passenger in the automobile driven by Carol McClintock. [p. 17]

Following his conversation with the McClintocks, appellant went to the home of Wanda Lou Holbert, who had recently returned from a hospital confinement. He received directions as to how to reach her home from the McClintocks. App. 95a. He went to the Holbert home for the purpose of interviewing her as "a witness to the cause of the accident and the circumstances surrounding the accident . . . [and not] for the purpose of soliciting her as a client." App. 58a. And in order to preserve whatever evidence she might be able to provide, appellant tape recorded his conversation with Wanda Lou. The transcription of that taped

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

During his discussion with the McClintocks appellant assured them that they did not need to worry about being sued by Carol's passenger because Ohio had a guest statute which prohibited such suits. He also explained the operation and underlying theory of the guest statute, and explained other theories of liability that could supercede it, but advised the McClintocks that in their case they had little to fear. In addition, appellant explained the uninsured motorist coverage of the McClintocks' policy and informed them that Carol could be compensated for injuries even though the driver who caused the accident had no liability insurance. He also explained how the negotiation and the settlement process generally worked in personal injury cases. [Tr. 167, 182, 234, and 96a-105a]. [p. 6]

Mr. Ohralik next went to visit Wanda Lou Holbert, the passenger in Carol's car who had also been injured in the accident. Wanda had just returned home after being released from the hospital, and appellant stated that he was calling on her as a witness to the accident. Shortly after their conversation began, however, appellant volunteered that he was already representing Carol and offered to represent Wanda as well on a one-third contingent fee basis. Wanda said, "O.K.," and they then discussed the circumstances surrounding the accident. During this discussion, appellant explained the

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

Appellant, in support of his claim that a binding agreement to engage his services had been made with Wanda Lou, introduced in evidence a tape recording of the February 13, 1974, conversation with Wanda Lou. The recording was made on appellant's recorder, hidden at the time of recording under appellant's coat, and made without the knowledge of Wanda Lou. Some of the recorded conversation indicates a consent by Wanda Lou to the utilization of respondent's professional services, but the conversation also demonstrates that this consent was induced and solicited by Appellant. [pp. 218-219]

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The following day, February 14, 1974, appellant telephoned Wanda Lou for purposes of firming the client-attorney relationship begun the preceding day. The phone was answered by Wanda Lou's mother, who unceremoniously advised him that his services were not desired. Appellant retorted by pointing out that it was not she but Wanda Lou, a competent consenting adult, who was his client. [p. 218]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

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Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

conversation appears at App. 118a-130a. [p. 19]

On February 15, a written agreement was signed by Carol in her hospital room, following a further discussion of the matter with appellant. App. 61a. [p. 19]

The following morning, February 14, Wanda's mother attempted to repudiate the oral agreement. When the appellant called the Holbert home to talk further with Wanda, her mother answered the phone and informed appellant that "We talked it over and we don't want to sue nobody, and we don't want you as a lawyer." App. 24a. Appellant reportedly replied: "Well, Wanda is eighteen. She is her own boss and she can talk for herself . . . . [and when] Wanda gets to feeling better, I would like for her to call me back."

Counsel for Other Amici
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National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

nature of the claims that Wanda had against the McClintocks' insurance company, he explained her obligations under their contingent-fee arrangement, and he cautioned her against speaking to insurance adjusters, frequently emphasizing that she was now represented by a lawyer. [118a-130a]. [pp. 6-7]

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The following day, February 14, 1974, appellant received a telephone call from Wanda's mother, during which she attempted to discharge him. Appellant, however, asserted that he was representing Wanda, an 18 year old, legally competent adult, and that Wanda's mother could not effectively discharge him. After this conversation appellant took no action to confirm his retention by Wanda but rather continued to assert claims on her behalf against the insurance company. Similarly, Wanda took no action to confirm her

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

Thereafter, both Carol and Wanda attempted to disengage appellant's services. Wanda's attempt began immediately, and Carol's some time after February 1974. Appellant insisted that he had a valid binding agreement with both, which he was determined would be performed. Appellant sued Carol McClintock on her signed agreement for the value of services rendered, and ultimately accepted a settlement in the amount of $4,166.66. [p. 219]

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

App. 24a. Later, on March 14, Wanda herself wrote a letter to appellant, stating:

> I do not wish to sue anyone so, would you please contact anyone that you informed and tell them you are not my attorney, that is if you have told anyone. Thank you.

Prior to the receipt of this letter, appellant had made certain insurance demands on Wanda's behalf, but he never received or consummated any settlement offer for her. [pp. 21-22]

By April 11, appellant had sent the insurance carrier a demand that Carol be paid the maximum $12,500; and shortly thereafter, appellant received an acknowledgement from the carrier that her claim was indeed worth $12,500 and that this amount would be paid upon execution of the proper releases. Such releases were never executed, for on April 12, 1974, appellant received a communication from Carol discharging him as her attorney and demanding that he transfer his files to another attorney; she, as well as her new counsel, asserted that appellant's services were worthy of no compensation and that the requested releases would not be executed. [p. 22]

As the findings below state (J.S.App. 3a, 14a), appellant insisted that he had valid binding agreements with both Carol and Wanda, which he demanded be performed. He in fact sued Carol

Counsel for Other Amici
(Public Citizen and
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for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

mother's attempted discharge. It was not until one month later, on March 14, 1974, that Wanda finally wrote a one sentence letter to appellant discharging him, apparently because of her feeling that there had been undue delay in her receipt of benefits from the insurance company. [Tr. 32, 63-65]. In addition, Wanda filed a grievance complaint against Mr. Ohralik. [p. 7]

In the meantime, Carol had also become dissatisfied with Mr. Ohralik's representation and wished to replace him with another attorney. She too stated that this was because of delay in receiving any payments from the insurance company, and because of what she stated was insensitivity and neglectful representation on the part of appellant. [Tr. 97-99, 118, 197]. In Carol's case, however, appellant eventually obtained an agreement from the insurance company to pay her $12,500, the maximum amount available under the policy, but Carol refused to accept the money and refused to pay appellant the $4,166.66 he claimed as a contingent fee. Appellant then sued Carol to collect his fee, and Carol hired a second attorney to defend that suit. Ultimately, the suit was settled, and Carol paid

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

Relator, Ohio State Bar Association, filed a complaint with the Board of Commissioners on Grievances and Discipline against Albert Ohralik, alleging that he solicited the personal injury cases of Carol McClintock and Wanda Lou Holbert in violation of DR 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility. [p. 217]

After hearings on November 24, 1975, and January 29, 1976, the Board found that the appellant did, in fact, solicit the personal injury cases of Carol McClintock, and Wanda Lou Holbert, in violation of DR-2-103(A) and DR 2-104(A), Code of Professional Responsibility.

The Board found appellant's defense, that the solicitation of business by an attorney is protected by the First and Fourteenth Amendments to the United States Constitution, to be without merit and overruled his motion to dismiss. [p. 219]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

Yet, four days after Appellant testified he would abandon his claim against Wanda, he sued Wanda Lou Holbert in the Chardon Municipal Court, Geauga County, Ohio, for $2,466.66, claiming a contract of employment. [p. 9]

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

on her signed agreement for the value of services rendered, and ultimately accepted a settlement in the amount of $4,166.66. [p. 22]

After a hearing before the Board of Commissioners, the Board concluded that the evidence "fully demonstrates" that appellant, in seeking and obtaining agreements from Wanda and Carol to represent them in their respective claims for damages arising from the February 2 accident, "violated Disciplinary Rule 2-103A and 2-104A of the Code of Professional Responsibility." The Board accordingly recommended that appellant "be given a public reprimand."

On review, the Supreme Court of Ohio without explanation escalated the sanction from a public reprimand to an indefinite suspension from the practice of law. And it added the comment that a "review of the record before us reflects ample, uncontraverted evidence supportive of the finding of the Board of Commissioners. . .that respondent, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A)." The court made no identification of the so-called "uncontroverted" evidence, much of which had been fully controverted by the appellant's

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

appellant the full fee that he had demanded. She also paid her second attorney a $900 fee. [Tr. 118-19, 133-34, 138, 140-41]. [pp. 7-8]

The complaints made by Wanda and Carol prompted the Ohio State Bar Association to request the initiation of formal grievance proceedings against appellant charging him with violating the two prohibitions on solicitation contained in DR 2-103(A) and DR 2-104(A). [p. 8]

After conducting an evidentiary hearing, a three-member Panel of the Board of Commissioners on Grievances and Discipline found that appellant had unethically solicited Wanda and Carol in violation of those two code provisions, and recommended that he be given a public reprimand. Appellant had argued that the two ethical provisions under which he was charged were invalid because they unconstitutionally deprived him of his First Amendment right of Free Speech, but the Panel rejected this argument, devoting only a single sentence to it. [p. 8]

On appeal, the Ohio Supreme Court upheld the Panel's ruling but, without explanation, increased appellant's punishment to indefinite suspension from practice and taxed $1797.28 in costs against him. The Ohio Supreme Court also summarily rejected appellant's First Amendment claim, again disposing of it in a single

Supreme Court of Ohio
Source: 48 Ohio St.2d 217

A review of the record reflects ample, uncontroverted evidence supportive of the finding of the Board of Commissioners on Grievances and Discipline that appellant, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A), in soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them in their respective claims for damages arising out of the accident of February 2, 1974. [p. 220]

Appellant is hereby indefinitely suspended from the practice of law for these unethical violations of the Code of Professional Responsibility. [p. 220]

Counsel for Appellee
(Ohio Disciplinary Agency)
Source: Motion to Dismiss

Counsel for Appellant
(Attorney Ohralik)
Source: Brief for Appellant

testimony and by the taped conversations. And the court made no effort to distinguish as between DR 2-103(A) violations and DR 2-104(A) violations. The court did reiterate, of course, its ruling that appellant's solicitation of business was not "protected by the First and Fourteenth Amendments to the United States Constitution." [pp. 23-24]

Counsel for Other Amici
(Public Citizen and
National Resource Center
for Consumers of Legal Services
(Source: Motion and Brief
of Amici Curiae)

sentence. The present appeal to this Court followed. [p. 8]

CITATIONS TO REPORTED DECISIONS
OF THE CALIFORNIA SUPREME COURT
IMPOSING DISCIPLINE ON ATTORNEYS
FOR DIRECT SOLICITATION AND
AMBULANCE CHASING
(Listed Chronologically)

Townsend v. State Bar
(1930) 210 Cal. 362, 291 P. 837

Smith v. State Bar
(1930) 211 Cal. 249, 294 P. 1057

Shaw v. State Bar
(1931) 212 Cal. 52, 297 P. 532

Smallberg v. State Bar
(1931) 212 Cal. 113, 297 P. 916

Howe v. State Bar
(1931) 212 Cal. 222, 298 P. 25

Irving v. State Bar
(1931) 213 Cal. 81, 1 P.2d 2

Dahl v. State Bar
(1931) 213 Cal. 160, 1 P.2d 977

Fish v. State Bar
(1931) 214 Cal. 215, 4 P.2d 937

Dudney v. State Bar
(1931) 214 Cal. 238, 4 P.2d 770

Recht v. State Bar
(1933) 218 Cal. 352, 23 P.2d 273

Remington v. State Bar
(1933) 218 Cal. 446, 23 P. 2d 510

Ring v. State Bar
(1933) 218 Cal. 747, 24 P.2d 821

Sawyer v. State Bar
(1934) 220 Cal. 702, 32 P.2d 369

Ewell v. State Bar
(1934) 2 Cal.2d 209, 40 P.2d 264

McCue v. State Bar
(1935) 4 Cal.2d 79, 47 P.2d 268

Roth v. State Bar
(1937) 8 Cal.2d 656, 67 P.2d 337

Waterman v. State Bar
(1939) 14 Cal.2d 224, 93 P.2d 95

Richardson v. State Bar
(1942) 19 Cal.2d 707, 122 P.2d 889

Utz v. State Bar
(1942) 21 Cal.2d 100, 130 P.2d 277

McGregor v. State Bar
(1944) 24 Cal.2d 283, 148 P.2d 865

Penaat v. State Bar
(1944) 25 Cal.2d 26, 152 P.2d 442

Griffith v. State Bar
(1953) 40 Cal.2d 470, 254 P.2d 22

Higgins v. State Bar
(1956) 46 Cal.2d 241, 293 P.2d 241

Tonini v. State Bar
(1956) 46 Cal.2d 491, 297 P.2d 1

Mitton v. State Bar
(1958) 49 Cal.2d 686, 321 P.2d 13

Honoroff v. State Bar
(1958) 50 Cal.2d 202, 323 P.2d 1003

Best v. State Bar
(1962) 57 Cal.2d 633, 21 Cal.Rptr. 589,
371 P.2d 325

Linnick v. State Bar
(1964) 62 Cal.2d 17, 41 Cal.Rptr. 1,
396 P.2d 33

Younger v. State Bar
(1974) 12 Cal.3d 274, 113 Cal.Rptr. 829,
522 P.2d 5

Geffen v. State Bar
(1975) 14 Cal.3d 843, 122 Cal.Rptr. 865,
537 P.2d 1225

Goldman v. State Bar
(1977) 20 Cal.3d 130, 141 Cal.Rptr. 447,
570 P.2d 463

see

77

56